

San Francisco Law Library

436 CITY HALL

No. 150438

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

2698

No. 12968

In the
United States Court of Appeals
For the Ninth Circuit

MONTE CLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

MORRIS LAVINE
620 Bartlett Bldg.
215 W. 7th Street
Los Angeles 14, Calif.
Attorney for Appellant.

FILED

OCT 18 1951

PAUL P. O'BRIEN
CLERK

TOPICAL INDEX

	Page
Jurisdictional Statement.....	1
Statutes Involved.....	2
Statement of the Facts.....	8
Specification of Errors	15
Argument	
I. There is no proof that Monte Cly was duly and regularly a member of the Rent Control Board No. 8. The evidence is to the contrary	18
II. The evidence is insufficient to support the verdict. The verdict is contrary to the law and the evidence.....	19
In none of the counts under which Cly was convicted was there any evidence that any of the matters were then pending before the Board or its mem- bers in its or their official capacity.....	21
Count III. Insufficiency of the evidence as to each count.....	22
Count IV	25
Count V	26
Count VII	31
Count VIII ..	33
Count IX	34
Count XI	36
The court erred in the admission of the evidence in the trial of the case.....	37
Court's erroneous ruling in the presence of the jury	40

	Page
Errors in instructions given.....	41
Error in comments to the jury.....	43
Trial judge rendered defendants' defense void.....	44
The trial court prejudicially erred in its comments on the facts of the case to the jury.....	46

TABLE OF CASES AND AUTHORITIES CITED

Cases

Cole vs. Arkansas, 333 U. S. 196.....	38
Corson vs. U. S., 147 Fed. (2d) 437.....	42
De Jonge vs. Oregon, 299 U. S. 587.....	38
People vs. Glass, 158 Cal. 650.....	38
People vs. Glass, 158 Cal. 658.....	40
People vs. Washburn, 104 Cal. App. 662.....	38
Quercia vs. United States, 289 U. S. 466 at 469, 470	43
Screws vs. The United States, 9th Circuit, 147 F. (2d) 437	42

Codes, Statutes, etc.

Criminal Code, Sec. 117.....	2
Housing & Rent Act of 1947, Laws of 80th Con- gress, Sec. 204 (1, 3 & 4).....	3, 15
Rule 37 (Rules of Criminal Procedure for District Courts of U. S.).....	1
U. S. Code, Title 5.....	18
U. S. Code, Title 18, Sec. 202.....	3
U. S. Codes, Secs. 1291, 1294, Title 28.....	1
U. S. Codes, Title 18, Sec. 207 (1946 Edition).....	2

In the
United States Court of Appeals
For the Ninth Circuit

MONTE CLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12968

Appellant's Opening Brief

*To the Honorable the United States Court of Appeals
for the Ninth Circuit:*

JURISDICTIONAL STATEMENT

Jurisdiction is conferred in this case by Sections 1291, 1294, Title 28, U. S. Codes. Rule 37 Rules of Criminal Procedure for the District Courts of the United States.

The judgment of the United States District Court for the Southern District of California, Central Division, was rendered on April 13, 1951. (R. 35). Notice of Appeal was filed April 13, 1951. (R. 39).

STATUTES INVOLVED

Title 18, U. S. Code, Section 207 (1946 Edition),
as follows:

“§207. (*Criminal Code, section 117.*) *Official accepting bribe.* Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. (R. S. §§5501, 5502; Mar. 4, 1909, c. 321, §117, 35 Stat. 1109.)”

Title 18, U. S. Code, Section 202, effective September 1st, 1948 (New Edition):

“§202. Acceptance or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in an official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.”

Public Law 129, Housing and Rent Act of 1947, Laws of 80th Congress—1st Session, effective July 1, 1947, Section 204 (1, 3 and 4):

“(c) The Housing Expediter is hereby authorized and directed to remove any or all maxi-

mum rents before this title [this appendix] ceases to be in effect, in any defense-rental area or portion thereof or with respect to any class of housing accommodations in any such area or portion thereof, if in his judgment the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exist, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met. The Housing Expediter is further authorized and directed to remove maximum rents for any or all luxury housing accommodations in any defense-rental area or portion thereof, if in his judgment such action would result in the creation of additional rental units by conversion. The Housing Expediter shall from time to time make surveys with a view to carrying out the purpose of this subsection to decontrol housing accommodations at the earliest practicable time.

“(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).

“(e) (1) The Housing Expediter is authorized and directed to create and, if necessary continue in existence until the termination of this Act in each defense-rental area (whether or not under Federal rent control) or such portion thereof as he may designate, local advisory boards. The Housing Expediter shall, whenever in his judgment

there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended [50:Appx. 25], prior to March 1, 1947, as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of such Act, in which maximum rents were not being regulated under such Act on March 1, 1947. Each such board shall consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors: Provided, That in any case where the Governor has made no recommendations for original appointments to local boards or appointments to fill vacancies, within thirty days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948 [Mar. 30, 1948]) from the Housing Expediter, the Housing Expediter shall without such recommendations appoint the original members of such boards or such members as may be required to fill vacancies. Nothing in the foregoing provisions shall require the reappointment of present members of local advisory boards, but any change in the membership of any local advisory board necessitated by this provision shall be effectuated as promptly as may be practicable. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on

which the board shall make recommendations to the officials administering this title [this appendix] within its area; and before recommending any such adjustment the board shall give notice to the parties and shall hold a hearing at the request of either party. Upon petition by a representative group of tenants or landlords, the board, if it finds that the petition is substantial in character, shall hold a public hearing in accordance with the requirements set forth in paragraph (4) of this subsection on any of the matters set forth in subparagraphs (A) and (B) of this paragraph. Such hearing shall be begun within thirty days after the filing of such petition, and shall be completed within thirty days after it is begun. Should the board for any reason fail to hold such hearing, the Housing Expediter, upon notice of that fact given by such group, shall (unless he finds that the petition is not substantial in character) hold a public hearing in like manner on such matters. Such hearing shall be begun within thirty days after the giving of such notice by such group, and shall be completed within thirty days after it is begun. If the Housing Expediter finds that such petition is not substantial in character, such group may file a complaint with the Emergency Court of Appeals within thirty days after the date such finding is made. Thereupon, if it finds that the Housing Expediter's finding is not in accordance with law, the Emergency Court of Appeals shall have jurisdiction to enter, within thirty days after the date of filing of such complaint, an order directing the Housing Expediter to hold such hearing. If a

hearing is held by either the board or the Housing Expediter, a recommendation by the board or decision by the Housing Expediter, as the case may be, on the merits of the matter shall be rendered within thirty days from the date of completion of such hearing, and the local board forthwith shall forward its recommendation to the Housing Expediter. Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title [this appendix]; and

(C) Operations generally of the local rent office with particular reference to hardship cases.

“(2) The Housing Expediter shall furnish the local boards suitable office space, stenographic assistance, and reporting services for public hearings (including attendance fees) and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense-rental areas which may be requested by such boards.”

STATEMENT OF THE FACTS

The defendant, Monte Cly, was a real estate broker and general contractor living in the Bay Area making up Venice, Ocean Park, Santa Monica and the country back of it. He had been residing in that area around 20 years. (R. 373). As a real estate broker, he was familiar with the rental situation in and about this bay area since 1942.

In November 1947, he was solicited to become a Member of the Board, by the Supervisor of the district, regarding Rental Controls. (R. 375). He had his own offices and own stenographic force. No oath of office was administered. Cly was given a document called an “Oath of Office” which he signed on the 6th day of November, 1947, (R. Tr., 240-241) before F. C. Moeller, Los Angeles *Rent Supervisory Board Liaison Officer*. It does not appear that Mr. Moeller was a person authorized to take or sign oaths of office or induction. It was stipulated that there appears on

Government Exhibit 14 for identification a record of an Oath of Office signed by the defendant Monte Cly on the 6th day of November as the date that he took the oath of office and is signed by him. (R. Tr., 239). There was no provision for any pay by the Government. The Board met twice a month or whenever the Secretary called them. Mr. Hill became Chairman of the Board in January, 1948. Hundreds of people started to come to the Board with respect to their rental problems—about 60% were landlords and 40% tenants. (R. Tr., 250). The Board met twice a month—every other Monday. (R. Tr., 251) down at Santee Street in Los Angeles.

The Government produced Mr. Hill as its witness. He testified that the Chairman of the Board Mr. Koepke, gave Mr. Hill a number of forms, Mr. Hill asked Mr. Koepke if charges could be made for services rendered in filling in the forms and other papers. He commenced to do that (make charges) when he got the green light from the boss. (R. Tr., 255). “Many persons would come in with, say, one apartment and say they lived in half of a double house. No charge was made for that.” Several hundred were made out without charges—at least 90%. (R. Tr., 256). The charges that were made were made for preliminary observation, for the work that was done in preparing the papers, going out and examining the properties, etc. (R. 69). It was not the duty of members of the Board to go out and examine the property—that was done voluntarily and on their own time. (R. 269). Recom-

mendations were made to the Housing Expediter who followed no recommendations except what his inspectors made. The Advisory Board simply recommended a certain increase and if the Housing Expediter sent his inspectors out and if they didn't like the looks of the property and they thought the Board was out of line they refused the increase. (R. 271). There was an arrangement between Mr. Hill and Mr. Cly to assist all tenants and landlords in filling out their papers. (R. 251). They began making a charge for their services shortly after the work load became very heavy. (R. 251). Before making the charges Mr. Hill discussed it with Mr. Cly first and then he discussed it with Mr. Koepke, the local rent area director for the Housing Expediter. That was in June, 1948. (R. 252). When he talked to Mr. Koepke, Mr. Cly was there and he asked Mr. Koepke, "Is it perfectly all right to charge for time and service?", and Mr. Koepke said, "Yes." (R. 253-254). The case against Mr. Hill was dismissed. (R. 244). Mr. Hill and Mr. Cly divided the monies received in half. (R. 201). As a member of the Board neither he nor Mr. Cly received any salary. Their services for the Government were gratuitous. The witness was asked this question by Government counsel, "Mr. Koepke, the Housing Expediter, or any one there, did he authorize you to make charges for your services to landlords or tenants?" A. "At one time we asked Mr. Koepke. Mr. Cly and myself asked—said that we had a lot of people wanting to file papers, etc.—and what should we do, and Mr. Koepke

said, 'Why charge them for it, of course, for your time and trouble in coming down here.' " Q. "Did he say how much to charge?" A. "No." (R. 216).

Newspapers carried publicity of the forming of the Board about the 12th of January, 1947, and people started coming to his house and to his office, morning, noon and night. (R. 376). They came in a constant stream; even during the night a lot of them would come to his house. He sent them to the proper offices and at times he and another member of the board prepared papers and documents.

Mr. Cly was one member of a five-man advisory board. The board meetings were not according to any set schedule, (R. 327) but Miss June Luscher would notify the Board Members when an accumulated amount of business would justify a meeting. This would result from the landlords or tenants applying for hearings by the Advisory Board of their applications or complaints or anything that they wished brought to the attention of the Board. There was a regular formal application they filled out and when a few of those would gather together, then we would notify the Board Members to come in and go into it. (R. 329). The Board Members would often bring in cases which apparently had been brought to their attention by individuals directly, and they would bring them into the meeting themselves. Mr. Hill and Mr. Cly did this very often. (R. 329). The board consisted of five; the quorum was three. (R. 330). Usually Mr. Hill and Mr. Cly were present. If there were only three present,

it took a unanimous vote to make an advisory recommendation. (R. 330).

Miss Luscher would handle the paper work and then any actual final orders that would be issued would be routed to the proper departments for their examination—the proper department to where recommendations would go. If the Board had recommended an increase in rent, it would go to the examining department where the actual orders were issued and then would be finally signed by the Rent Director, Mr. Koepke. (R. 331). She would request that an inspector be sent out to a certain property.

The office of the Inspector was at Santee Street. The Board Meetings would also be held at Santee Street, in Los Angeles. (R. 332).

Herbert A. Frank testified that he was a consultant in O.P.A. matters located in Santa Monica. He had been a rent inspector for the O.P.A. and when they closed their offices he went into business for himself as a rent consultant. He prepared petitions for landlords and things like that and charged a fee. (R. 116).

Mr. Hill was a witness for the Government. He testified that the making of charges was authorized by Mr. Koepke, the local rent area officer in charge for the Housing Expediter. His case was dismissed. Koepke denied he gave this authority. (R. 244).

Mr. Cly was convicted of Counts ~~One~~^{THREE}, Four, Five, Seven, Eight, Nine, and Eleven, and sentenced to 18 months in the penitentiary and fined on Count Three—

\$150.00, on Court Four—\$750.00, on Count Five—\$900.00, on Count Seven—\$300.00, on Count Eight—\$270.00, on Count Nine—\$135.00, and on County Eleven—\$50.00. Total fines: \$2,555.00.

The indictment charged that on November 6, 1947, Monte Cly *signed* the Oath of Office as a member of Rent Supervisory Board No. 8 of the Los Angeles Defense Rental Area and continued to serve as a Board Member until his resignation on January 15, 1949. The indictment also alleges both defendants Cly and Hill were duly appointed pursuant to Public Law 129, 80th Congress, cited as Housing and Rent Act of 1947, effective July 1, 1947, Section 204(e) (1) thereof, which authorized and directed the Housing Expediter to create in each defense rental area, or such portion thereof, as he may designate thereof, a Local Supervisory Board, each Board to consist of not less than five members to be appointed by the Housing Expediter from recommendations made by the respective Governors. It also alleged that said Rental Advisory Board No. 8 in Los Angeles Defense Rental Area was duly created pursuant to said Housing and Rent Act of 1947. The functions of the local boards was to make such recommendations to the Housing Expediter as they deemed advisable with respect to decontrol of apartments, housing units, and rental property within the Defense Rental Area, and to take necessary action in regard to the decontrol of such units or the increase or decrease in rent as the Board considered appropriate.” These facts were alleged in Count I.

Count Three, on which appellant was convicted, alleged, that on December 6, 1948, defendant did unlawfully and in violation of Title 18 U. S. Code Section 202 accept and receive a check in the amount of \$50.00 from Mr. and Mrs. Claude W. Chapman with the intent that their action would be influenced thereby in favorably recommending to the Housing Expediter that rent increases be authorized at that certain property known as the Montezuma Apartments at 407 Ocean Front Walk, Venice, California, *this being a matter then pending before them in their official capacities.*” Other facts essential to a valid indictment and set out in the last paragraph of Count One were not realleged on the counts on which conviction was based, but were specifically omitted.

Each of the counts charged transactions with different names and different addresses in identical terms. Each charged that the matter was “*then pending before them in their official capacities.*”

SPECIFICATION OF ERRORS

The appellant specifies the following errors in the record of the trial of the proceedings:

1. (a) The indictment in the counts on which conviction was had fails to state an offense against the laws of the United States. It fails to allege that they "took" the oath of office, and before one authorized to give it. It also fails to state in such counts that they duly and regularly became officers of the United States as members of Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area.
(b) The Public Law No. 129, 80th Congress, cited as the Housing and Rent Act of 1947, does not forbid the taking of money for services rendered in connection with the Housing Act, and such acceptance of money was not made unlawful by the act.
2. The evidence is insufficient to support the verdicts. The verdicts are contrary to the law and the evidence.
(a) The evidence fails to show that the defendant Monte Cly duly and regularly actually became a member of the Rent Advisory Board No. 8. The evidence is that he *signed* an Oath of Office, but the Oath of Office on its face shows that it was not signed before an officer duly authorized to take oaths of office or that he was ever lawfully given the oath of office and inducted as a lawful member of the Advisory Board.

- (b) The evidence is insufficient to show that the defendant Cly was duly appointed pursuant to the provisions of Public Law 129, 80th Congress, and in the manner prescribed by law for such appointment. The evidence shows that he was solicited to become a member of the Board by a Supervisor.
- (c) The evidence is insufficient to show that any matters in which monies were taken "*were matters then pending before Monte Cly in his official capacity as a member of the Rent Supervisory Board.*" Count Three alleges taking \$50.00 from Mr. and Mrs. Claude W. Chapman, and that the matter was pending before the Board and its members in their official capacity. The evidence fails to show that the matter was pending before the Board in its official capacity. Count Four charged taking \$250.00 from Mr. and Mrs. Harry Neiditch, which was not shown by the evidence to be pending before the Board in its official capacity. Count Five charged the taking of \$300.00 from Don Greco, which was not shown by the evidence to be pending before him in his official capacity. Count Seven charged the taking of \$100.00 from Norman Westcoatt, Executor, which was not shown by the evidence to be a matter then pending before the Board in their official capacity. Count Eight charged the taking of \$135.00 from Mrs. Mabel Preston, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Nine alleged the

taking of \$50.00 from Mrs. Frances Barker, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Eleven charged the taking of \$50.00 from Mr. and Mrs. Frank Cohen, which was a matter not then shown by the evidence to be pending before the Board in its official capacity.

- (d) The evidence of the government shows affirmatively any lack of criminal intent. The government is bound by the testimony of its witness Mr. Hill.
- (e) The evidence is lacking in proof of any criminal intent.
- 3. The Court erred in admitting testimony of alleged similar transactions regarding Earl J. Templeton (R. Tr. 90, 110) over objections.
- 4. The Court erred in the admission and exclusion of evidence.
- 5. The Court erred in its comments to the jury on the facts of the case. The comment was one-sided and unfair in its scope and virtually told the jury to convict. It added to the facts, and assumed facts not proved and destroyed the constitutional privilege of the accused to testify in his own behalf before the jury without destruction by judges "comment."

The Court erred in its instructions to the jury. The instructions were confusing on the essential law of the case, as charged in the indictment.

ARGUMENT

I.

THERE IS NO PROOF THAT MONTE CLY WAS DULY AND REGULARLY A MEMBER OF THE RENT CONTROL BOARD No. 8. THE EVIDENCE IS TO THE CONTRARY.

1. The indictment says he "signed" the oath of office. It does not say he "took" it. The testimony shows it was signed before a liaison officer of the Rent Administration. He was not authorized to give oaths of office. Title 5 Sections U. S. C. specify who may give oaths of office. The liaison officer of the Housing Administration is not one of them.

2. The evidence does not show that Cly was "duly" selected. He was picked by the "Supervisor" of the district on housing.

3. The Act gives no power to individuals, but only to the Board to make recommendations on matters officially before the Board. No offense is charged in charging individual action. The indictment does not charge being influenced to act on the Board.

II.

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT
THE VERDICT. THE VERDICT IS CONTRARY
TO THE LAW AND THE EVIDENCE.**

At the outset it must be pointed out that Housing and Rent Act of 1947 contains no provision either for any compensation or salaries from the government for members of the Advisory Board, nor for reimbursement by the government of expenses. Nor does the Act forbid any member of the Board from receiving private compensation for incidental services, ~~clinical~~ work, cost of gasoline in making inspections, etc. The questions then in this case narrow down to the following:

1. Was there a matter *then* pending before the Board in *its official capacity*, as alleged in each of the counts of the indictment? **The proof fails to show it.**

2. Was any money given and received by the appellant for the purpose of influencing his action in any such matter *then pending before them in their official capacity*? **The proof fails to show it.**

3. Was any money received with intent that his action would be influenced thereby in favorably recommending certain matters to the Housing Expediter?

At the outset, let us examine some applicable law in the questions involved. Neither count three, nor any of the other counts of which the appellant was convicted charge that the appellant was *acting in his offi-*

cial capacity as a member of said Rent Advisory Board Number 8. This allegation was presented in the first count of the indictment, but omitted and excepted to in all of the other counts of the indictment. This element of the indictment was highly essential to create a public offense, because various government officials are permitted to take compensation and act in private capacities although holding government positions.

It is well known to this court that at the last two sessions of the judicial conference, the questions of the United States attorney accepting private employment in their private capacities while holding government positions has been a subject of considerable discussion. For many years the clerks of the court were permitted to take additional fees, or there were fees reverted to them for work done in supervising printing, securing attorneys as members of the bar, and other matters. Men who hold honorable positions cannot be denied compensation or reimbursement of time and expense on their private time. They are not acting in their official capacity when their time, their gasoline, telephone, stationery and other features of service are rendered.

In the instant case, the men received no compensation on the Board. Mr. Cly had a private business and private offices for which he had to pay rent, telephone, stationery, stenographic service.

The announcement of the formation of the Board caused hundreds of persons to come to his office, as

well as his home, keep his telephone and his office busy both day and night.

As a result of the request for services, filling out forms, doing typewriting work and many other clerical services, Mr. Hill, the chairman of the Board, asked Mr. Koepke if it was all right to charge for those services. Mr. Koepke gave his consent, according to Mr. Hill. The government put Mr. Hill on and they are bound by his testimony. (R. 215, R. 216). Mr. Koepke said, "Why, charge them for it, of course, for your time and trouble in coming down here. (R. 216). No charges were made to influence anybody, nor were they asked, or received for that purpose.

IN NONE OF THE COUNTS UNDER WHICH CLY WAS CONVICTED WAS THERE ANY EVIDENCE THAT ANY OF THE MATTERS WERE THEN PENDING BEFORE THE BOARD OR ITS MEMBERS IN ITS OR THEIR OFFICIAL CAPACITY.

We challenge the government to show any evidence to establish that any of these matters were *then* pending before the Board members in their official capacity. Without it the evidence is entirely insufficient.

Furthermore, the charge as framed does not allege that the defendants asked or received the money for influencing their own actions as a member of the Board, or *in their capacities on the Board* in influencing their actions to make a favorable recommendation to the

Housing Expediter. But action before the Housing Expediter must be *an action by the Board*, not their individual action.

In none of the counts or transactions is there any substantial evidence that the appellant Cly's actions were influenced in anywise by the receipt of any money.

COUNT III.

INSUFFICIENCY OF THE EVIDENCE AS TO EACH COUNT

Count three of the indictment relates to a transaction on December 6, 1948, in which \$50 was received by Mr. Hill from Mr. and Mrs. Claude Chapman, owners of a property known as the Montezuma Apartments at 407 Ocean Front Walk, Venice, California. Mr. Hill, president of the Board, whose case was dismissed, came to his apartment twice. (R. 22). On December 6th, *prior to that date, he didn't have any matter pending before Advisory Board No. 8.* (R. 23). He had a telephone call. Went to Mr. Cly's office and Mr. Cly and Mr. Hill were there.

Claude C. Chapman had dealings with Mr. Hill. (R. 24). He brought all of his OPA papers to the office. He was asking for a raise of rent. (R. 24). He had not made any application to the Board. He came to the office to provide those papers to Mr. Hill. Hill said the office would make out the papers. He made out a check to give to Mr. Hill. (R. 27). \$50.

Mr. Hill told him that there had to be papers filled and there had to be some work on it. *Mr. Hill said there would be quite a bit of work on the papers and it would cost \$10 and an apartment for each of the applications to make them out.* (R. 28).

Mr. Hill and Mr. Cly were members of the Board at that time. He did not give the money to Mr. Hill or Mr. Cly to bribe them. *Payment was for the work. They said there would be quite a bit of work connected with it, or something to that effect.* (R. 31). *He did it on account of they said they could get quicker results and they would have to draw the papers up anyway and the apartment house association more than likely would charge me something for drawing the papers up and I eventually gave them the \$50.* (R. 31). After he filled out the papers an inspector was down to his place. (R. 32). He did not appear before the Board. *At no time did it occur to him that he was paying Mr. Hill for his influence on the Board.* (R. 33). *Mr. Cly was not there. It was not his intention to give the money for that purpose.* (R. 34). *Mr. Hill was at his apartment four or five times.* (R. 34). The testimony is, thus, insufficient!

(a) To show that any matter was pending before the Board.

(b) That money was asked or received by Cly to influence any actions or that Mr. Cly's actions were in anywise influenced to make any recommendations to the Housing Expediter in an official matter then

pending before the Board. It will be noted that nearly the whole transaction was conducted by Mr. Hill whose case was dismissed.

The indictment charged the appellant accepted and received a check in the amount of \$50 from Mr. and Mrs. Claude Chapman. The sole testimony about giving you the check was that his wife gave it to Mr. Hill. (R. 27).

“Q. You gave the check to whom?

A. I gave the check to Mr. Hill, I think.

Q. You think you gave the check to Mr. Hill?

A. I think my wife gave it to Mr. Hill, but I am not sure of that.” (R. 27).

The proof was entirely insufficient.

(a) That Mr. Cly received any check.

(b) That he was acting in any special capacity.

(c) That any matter was a proceeding which was then pending before him in any official capacity.

(d) That it was given with the intent to influence the decision or action, or accepted with that intent.

Judgment of acquittal should have been granted at the end of the government case on the motion of defense counsel duly made. (R. 366, R. 367).

COUNT IV.

As to count four, the evidence is insufficient for each of the reasons pointed out as to count three with the additional facts shown with reference to count four as being insufficient. Count four charged the acceptance and receiving by the defendant, Cly, of a check in the amount of \$250 from Mr. and Mrs. Harry Neiditch, with reference to recommending favorably to the Housing Expediter that rent increases be authorized at a property located at 1341 Fourteenth Street, Santa Monica, California. Mr. Neiditch said that he did not have any occasion to contact Mr. Cly, that he contacted Mr. Hill. (R. 69). Never talked to Mr. Cly. (R. 70). Mrs. Neiditch never had any dealings with Mr. Cly. (R. 71). One time Mr. Cly walked through the office, didn't participate in any conversation. All her discussions were with Mr. Hill. (R. 73). Mr. Hill at no time testified that his actions were influenced or that he influenced Mr. Cly's actions, or that Mr. Cly's actions were ever influenced in connection with any matter coming before him with reference to this property.

The evidence therefore does not show Mr. Cly ever received a check.

(a) That he ever received a check.

(b) That any matter was then pending before him in his official capacity.

(c) Or that he was acting in his official capacity.

(d) Or that his actions were in any way influenced in making any favorable recommendations with reference to the Neiditch matter. Evidence is wholly insufficient to support the judgment.

COUNT V.

As to count five, each of the grounds urged as to counts three and four are reurged here with the additional facts as follows:

Count five alleged that the defendants accepted and received \$300 in cash from Don Greco with the intent that his actions would thereby be influenced in favorably recommending to the Housing Expediter that an increase be authorized at that property located at 126 Palisades, Santa Monica, California, this being a matter then pending before him in his official capacity. Mr. Greco testified that Mr. Cly came over to his house with Mr. Hill. Never had any contact by telephone or otherwise prior to that visit with Mr. Cly. Mr. Hill brought him over (R. 169) and he asked Mr. Hill what he thought about the property in the presence of Mr. Cly. (R. 17). Mr. Cly said he thought it was well worth the raise that he was trying to get, that he wasn't getting enough rent for the bungalows there. (R. 170). Mr. Cly said, "I think you should be able to get a raise on it because the property is a nice piece of property." The conversation went along the line that the property was well worth the raise and he thought that Mr. Greco should be able to get a hun-

dred or a hundred and twenty-five dollars and made the remark he didn't want that much, he wanted just a reasonable raise and he said they would help him, and at the conclusion he said it would cost Mr. Greco some expense money. Mr. Greco asked him how much, and he said it would amount to \$300, both for paper and expense of that kind. (R. 171). He said he paid Mr. Cly \$300 in cash. He didn't know Mr. Cly was a member of the Board. (R. 172). He presumed Mr. Hill was, he didn't know he was. He thought he might have something to do with it. (R. 172). Never went to their offices, didn't have any further contact with him; he never saw him after that time. He got an increase per bungalow, but he never used that increase on the tenants. He got permission to raise the rent \$5. He had 6 bungalows. (R. 174). He didn't have any paper. Quite a few months later, probably 3 or 4 months later, that he got an increase. There was an inspection made of his premises. Doesn't remember whether it was by a lady or gentleman. That was after this meeting with Mr. Cly and Mr. Hill. (R. 175). He wasn't there at the time of the inspection. Mr. Hill and Mr. Cly looked over the premises very carefully when they first came there. (R. 174). He had known Mr. Hill for some time prior to that time, Mr. Greco had a bar and he didn't know if he had met Mr. Hill at the bar or not. He was in Mr. Hill's office once or twice. (R. 176). Had a little office and printing shop in Santa Monica. (R. 176). Didn't know where Mr. Cly's office was. Some papers were prepared and he brought

the papers down signed. (R. 177). Were brought to Mr. Hill. He thinks Mr. Hill prepared the papers. (R. 177). Nothing was ever said at any time about influencing the actions of the Board with relation to the rent at the time of the payment of the money. (R. 178). At no time did he have in mind that he was buying the favor of the local rent board in connection with his application. (R. 178). He had no idea that the matter would even come up before the Board.

He didn't know that Mr. Cly was a member of the Board. He didn't know whether Mr. Cly had the influence of the Board and he wasn't buying any influence and he didn't offer him a bribe for any influence. (Cal. 179).

He did not bribe them for their influence and that was farthest from his mind. (R. 180). Mr. Hill testified that he went over to Greco's place and went through all the apartments. He thinks that Mr. Cly was with him but he might be mistaken on that. (R. 189). He went through all of Greco's apartments and felt that the man was justified in asking for his increase because he had a beautiful place there. Hill filed papers for him and had the inspectors come out and look over his place. They permitted him an increase in the rent which was not in line with what I felt he deserved, but I felt it was better than nothing. (R. 189). The matter came up before the Board and two other members of the Board went out and looked over the place . . . Mr. O'Brien and Mr. Smith. (R. 190). They asked that the property be inspected. \$5.00 a

month increase was recommended for six apartments. (R. 190). Mr. Hill wrote Koepke protesting that there was not enough.

The matter did not come up before the Board until July. Could have been August 13th. (R. 192). When the matter came up before the Board they all discussed it, all gave their opinions, because we were all Santa Monica people. He didn't know whether it went to Mr. Koepke, but supposed it went into his hands, but the inspectors went out and they in turn either denied the recommendation or concurred in it. (R. 192). When the inspectors went out Mr. Hill accompanied them that day. (R. 192). Recommendation was made for a \$5 increase. Mr. Hill thought it was worth considerably more. \$300 was paid. Mr. Cly got some of the money. (R. 193). Mr. Hill said he knew Mr. Greco for many years (R. 198) and Mr. Greco asked if there was any way he could get the property increase. Thinks Mr. Cly was with him, but he might be wrong. He checked comparable rents and found that other properties not nearly as nice were renting for considerably more, so he told Don (Greco) that we would try to get him an increase. Mr. Hill said that Greco was willing to pay for our time and trouble, and that the money represented the amount that we spent, "and I am going to continue to use the singular." I came into Los Angeles and I looked over the records and looked over what particular properties were renting for and he was way below the margin, in my opinion, especially comparing it with the nice place he has, and he said he was

perfectly willing to pay us for our time and trouble in doing that. When we filed the papers for him, or I filed the papers for him (R. 199). He said he filled out a paper that was a long drawn out thing, answered all the questions, etc. (R. 199). Mr. Hill prepared the papers. Mr. Cly has the real estate office and they used Mr. Cly's office in connection with rent advisory board matters. (R. 200). At the time the money was paid he knew the matter would come up before Ford in the future. (R. 199).

Mr. Hill states that nothing was pending before the Board (R. 199). He made out all of the papers, divided the money, half to Mr. Cly (R. 201) Mr. Hill did all of the typing and Mr. Cly when they first found out it was all right to ask for their expense money, etc., for doing this work (R. 202) knew of client. Mr. Cly denied he was present when Greco paid Hill the \$300. (R. 499, R. 500).

COUNT VII.

Count seven charged receiving \$100 in cash from Norman Westcoatt, executor of the estate of Lily Dillon, deceased, regarding a property located at 1002 Nowida Place, Venice, California. Mr. Westcoatt testified that on November 20, 1948, he had some discussion with Mr. Hill (R. 130) at Mr. Cly's office, Mr. Cly being present. Mr. Cly told Mr. Hill to go out and look at the property, and from that time on Mr. Hill wrote the letters and carried on the business with him. (R. 131). Mr. Hill first came out and looked at the property and there were so many different forms that had to be filled out and different things, and it was so confusing and everything else, so I looked at the Venice papers and read about the Rent Board, and that is how I got in touch with the office down there. He asked where could he get those papers filled out and Mr. Cly replied that Mr. Hill makes out these papers (R. 132). He asked how much it would cost to fill out these papers as he was leaving to go out of town, and I asked what it would cost. Mr. Hill knew he had better go over and look at the property and that is when Mr. Hill came over and made out the papers, and I asked Mr. Hill what it was going to run me. He at no time ever discussed the matter with Mr. Cly. (R. 132, 133). He paid \$100 in cash presumably to Mr. Cly. *\$100 was to make the papers out for the eleven units.* When Mr. Hill came back, Mr. Westcoatt said there is so much red tape with these letters and papers and the hardship and the taxes I will just forget about it. (R.

138). He did his work in good faith and Mr. Westcoatt paid him for it. (R. 138). All that was said in that relation to the matter by Mr. Cly was "Well, we will do the whole job for \$100, so I paid him." (R. 130). The dealings were almost entirely with Mr. Hill (R. 140) *who was told definitely and specifically that the \$100 was for services in connection with Mr. Hill preparing the papers.* (R. 141) There was no discussion about any rent increase he would get. *He did not appear before the Board. At no time when he gave the \$100 did he have in mind that he was paying for the influence of Mr. Cly as a member of the Rent Advisory Board No. 8 to give favorable action* (R. 142) nor to influence Mr. Cly's actions as a member of the Rent Control Board (R. 143). He did not know at the time Mr. Hill or Mr. Cly were members of the Advisory Board (R. 144).

This evidence was entirely insufficient to show that any money was asked or received to influence his actions, or that any matter was then pending before Cly in his official capacity.

COUNT VIII.

Count eight of the indictment charged Cly with asking and receiving \$90 in cash from Mrs. Hazel Preston with intent that his action would be influenced thereby in favorably recommending to the Housing Expediter, a rent increase at 1423 - 19th St., and 2840 Santa Monica Blvd., 543, 549 Lincoln Blvd., Santa Monica, Calif. Francis Barker testified regarding count eight (R. 153). Mr. Cly introduced her to Mr. Hill. He paid \$45 to Mr. Cly. (R. 157). \$15 per unit for 3 units. He asked Mr. Cly what the \$15 was for *and it was for the paper work* (R. 161). *He didn't know that Mr. Cly was a member of the Advisory Board* (R. 161). It was her idea *of the charge for the paper work*. (R. 162). *She had papers made out, never attended any Board meetings. Nothing said with reference to influencing Mr. Cly upon the outcome of the application* (R. 165). *It was purely for paper work as we understood it* (R. 165). The evidence is insufficient to show that the money was paid to influence anybody for making a favorable recommendation to the Housing Expediter, or that there was any matter then pending before Mr. Cly in his official capacity or otherwise, or that any matter was then pending before the board.

COUNT IX.

In connection with Count nine we point out that the evidence is¹⁴ sufficient upon each of the grounds mentioned in connection with Count 3, and in addition thereto, we point out the following:

That Count 9 charges the receipt of \$45.00 from Mrs. Francis Barker, who also has a sister by the name of Mrs. Preston, the Mrs. Hazel Preston referred to in Count 8. She said she and her sister were handling the transaction at the time, and her testimony, as set out in Count 8, also relates to Count 9.

Mrs. Murray Spencer, Geraldine Spencer, (R. 77) testified as to count 8 that she had a conversation with Mr. Cly over the telephone and asked him if she could see him and told him that she had the deed to the property—that it finally had been vacated and she was keeping it vacated as a sort of one man's stand against the rental ceiling, that she had it vacated for six months and then she decided to redecorate and rent it. Mr. Hill and another man came up and looked at the place. (R. 80). It was in June of 1948 that she went down to Mr. Cly's office, she saw he was a general contractor and he was on the Board, and felt she had a fine story and wanted to get a better rental before she put it on the market (R. 81). She knew he was going to try to help her get a better deal but with all the money she had spent on it as far as redecoration could be used as added rental, because she had spent a lot of money (R. 82). She doesn't remember what kind of arrange-

ments she made. She paid him \$200.00, and thinks her house was decontrolled before *she gave him the money, she can't remember when she gave it to him.* (R. 83). She couldn't remember whether she paid the money before or after the decontrol (R. 86), Mr. Cly never told her he would use his influence as a member of the Board to get her house decontrolled, nothing like that intimated. (R. 86). If the \$200.00 was just a gift in services rendered, she really didn't know. (R. 87). She never believed she filed an application with the Office of the Housing Expediter on the 19th of June, 1948 asking that her property be decontrolled. She just signed it and didn't file it. She signed it in Mr. Cly's office. (R. 87). It was prepared by someone else and handed to her by Mr. Cly. *She never appeared before the rent control board.* The copy came back marked filed. She made a point of paying cash for anything that was to be done and just asked for a receipt. (R. 89).

The evidence is insufficient to show that any money was *asked for the purpose* of or received for the purpose of influencing any official action, or that there was any matter pending before the Board.

COUNT XI.

Count Eleven charges accepting and receiving the sum of \$50.00 from Mr. and Mrs. Frank Cohen, with the intent that their acts would be influenced thereby in favorably recommending to the Housing Expediter that rent increases would be authorized on certain properties located at 209 and 209½ Club House Drive, Venice.

Rose Reubens, who was formerly Mrs. Frank Cohen, (R. 122) testified that she had some rental property in Venice located at 209 and 209½ Club House Avenue, Venice. She didn't know whether her husband ever discussed their property with Mr. Cly. She was never with him when he discussed this with Mr. Cly. He subsequently died, on October 19, 1950. (R. 124).

The evidence fails to show that Mr. Cly accepted and received the sum of \$50.00 from Mr. and Mrs. Frank Cohen with the intent that his action should be influenced favourably recommending to the Housing Expediter that rent increases be authorized at 209 and 209½ Club House Drive, Venice. There is no evidence that the matter was then pending before the board in its official capacity.

THE COURT ERRED IN THE ADMISSION OF THE EVIDENCE IN THE TRIAL OF THE CASE

Over objection, the testimony of Earl J. Templeton was admitted to show intent (R. 91). His testimony was that on another occasion, the exact date of which he couldn't remember, he called Mr. Cly in regard to his property. It was in 1948. (R. 91). It was Sunday evening. He was to meet at 7:00 o'clock at Mr. Hill's home. When he arrived nobody was at the house. After a while they got there, and then Mr. Hill and Mr. Cly and he sat down on the davenport, all together, discussed an OPA folder, and either Mr. Hill or Mr. Cly made the statement when he started "Well, we have been all around a little." He said "You know how business is done . . . the boys down at the OPA office have to live too" and a hundred dollars was suggested. (R. 92). That was all that was said. He never did pay it. (R. 94). He had two papers pending before the OPA Board of Decontrol. (R. 94). The office at Santa Monica regarding the OPA had been closed when he saw Mr. Hill and Mr. Cly. He went to Mr. Cly to find out why the increase in occupancy had not been allowed, and he had raised his rent from \$35 to \$50, telling his tenants he was going to file and did file for an increase in rent. (R. 98). It was sometime after Thanksgiving in 1949. He never had any matter pending before Advisory Board No. 8. (R. 99). He never appeared before the Board. (R. 100). He could not say definitely which of the

two men said he reported. This was the only time he had ever seen these two men. (R. 101).

A motion was made to strike the evidence at the close of the government case. (R. 363, 364). The Court, in denying the motion to strike, said, "If the jury believes his testimony, it shows, at least, that Mr. Cly was susceptible of accepting a bribe." Testimony as to similar transactions is not admissible for the purpose of showing "at least that Mr. Cly was susceptible of accepting a bribe."

Where the charge is bribery paid with specific intent to influence a specific action, testimony as to a "similar" offense is not admissible, for it would permit conviction of one charge upon proof of another not alleged, and violates due process of law guaranteed by the Fifth Amendment.

Cole vs. Arkansas, 333 U. S. 196;

De Jonge vs. Oregon, 299 U. S. 587.

In the case of *People vs. Glass*, 158 Cal. 650, the Supreme Court of California said:

"Headnote 2: The law would not have permitted evidence of distinct acts even to show a former bribery of Oakland Supervisors. Not only is the prosecution forbidden to show a former distinct crime, but it is also forbidden to prove former distinct acts short of crime, the tendency of which is only to degrade and prejudice the defendant in the minds of the jury." In that case the Court said in discussing the case at length, "It

would, no doubt, have made most potently against this defendant in the minds of the jurors if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilman there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury.”

This case clearly and fully discusses the bad effect of permitting evidence of the character allowed in the instant case to be introduced.

In the case of *People vs. Washburn*, 104 Cal. App. 662, the Court specifically held that evidence of another bribery is not permissible to admit a separate offense.

Only in certain types of cases where the issue of plans, schemes and designs are involved, may there be proof of similar transactions, and in such case, the alleged similar transactions must establish the corpus delicti of the similar transaction or it is not admissible in any event. In each of these instances, in instant case, each and all of these requirements were missing. The testimony, therefore, was entirely prejudicial, since it was the only testimony in the entire record which indicated, as the court expressed it, in the presence of

the jury "That Mr. Cly was susceptible of accepting a bribe." (R. 64).

The Court's comment in this case is what the Supreme Court of California specifically contended as highly prejudicial in its opinion in *People vs. Glass*, 158 Cal. 658.

COURT'S ERRONEOUS RULING IN THE PRESENCE OF THE JURY

The Court said in the presence of the jury after a witness had testified that the money she paid was "purely for paper work as we understood it." (R. 165).

"The Court: We might as well settle that question right now, and this is a comment not binding upon the jury, but we know that when anybody is in the government business, we do not have to pay them a fee for them to do their work."

Mr. Shippey: Now, that is assuming . . .

The Court: It is certainly unusual, but my comments in that respect are not binding on the jury. You are to settle that question. I don't want to hear any more argument.

Mr. Shippey: I'm not going to argue, but I am going to ask that the record indicate that we take an exception to the remarks of the Court.

The Court: You don't have to take an exception, the exception is automatic.

Mr. Shippey: Very well. Just so long as the record reflects our feeling in the matter, that is sufficient." (R. 166).

This was a prejudicial statement of fact, as of law, in the presence of the jury. Many persons in the government service receive a fee for them to do their work. Certain statutes have been set up specifically permitting the taking of fees, for instance, for the taking of an oath of office, notarial work, and many other features of government service. For a long time the Clerks of the District Courts worked on a fee basis. The United States Marshal's office still works on a fee basis and any service of papers by the Marshal has to be paid for privately.

ERRORS IN INSTRUCTIONS GIVEN

THE COURT ALSO ERRED in instructing the jury as to the entire statute under which the appellant was prosecuted. (R. 578), as follows:

“Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either house, or of both houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceedings which may

at any time be pending or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be guilty of an offense.”

The instruction regarding the statute was misleading, since the indictment only charged the appellant with accepting or receiving money with the intent of having his decision influenced on a question at that time *pending* before him in his official capacity; to charge him under the entire statute was to charge him and to confuse the jury on the charge not actually contained in the indictment. While the charge of the entire statute was not objected by counsel, nevertheless, the matter went to the very heart of the case, and where a jury has not been properly instructed as to the law, or has been erroneously instructed regarding the law that goes to the very heart of the case or in a misleading fashion, prejudicial error will be deemed committed and reexamined on the plain face of the record. (*Corson v. U. S.*, 147 Fed. (2d) 437).

In *Screws vs. The United States*, 325 U. S. 106-107, the Court says:

“And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take notes of it on our own motion.”

In *Corson vs. The United States*, the Court of Appeals of the Ninth Circuit, 147 F. (2d) 437, says that

the jury must be properly instructed as to the law of the case.

Here we have a charge not made by the indictment and attempted to be presented to the jury. The case was tried on the charge not made by the indictment, as there was no proof of the charges actually made by the indictment; therefore, the error was highly prejudicial.

The court also erroneously instructed the jury on the statute that was not yet passed. The court read the jury the later statute instead.

ERROR IN COMMENTS TO THE JURY

In *Quercia v. United States*, 289 U. S. 466, at 469, 470, the Supreme Court pointed out that the privilege of the Judge to comment on the facts has its inherent limitations. "His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness—he may analyze and desiccate the evidence but he may not either distort it or add to it. His privilege of comment, in order to give appropriate assistance to the jury, is too important to be left with the safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his slightest word or intimation is received with deference and may be controlling.' This Court has accordingly emphasized the duty of a trial

judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided' that 'deductions and theories not warranted by the evidence should be studiously avoided.' He may not judge 'upon a supposed or conjectural set of facts of which no evidence has been offered.' 'It is important that hostile comment of the Judge should not render vain the privilege of accused to testify in his own behalf.' "

TRIAL JUDGE RENDERED DEFENDANTS' DEFENSE VOID

Examined in this light, the comments of the trial judge in this case violated all of these fundamentals. The trial judge told the jury, "The question is, did they have a right to accept a bribe because it required work." (R. 570). This assumed that a bribe was accepted, which was the very issue that the jury had to decide. The Court then went on to argue, "Would I be justified because I don't think I am being paid enough to accept money from litigants and then say it was simply for my services?" "They say they were only supposed to be working while they were sitting on the Board. Would I be justified in accepting money as an attorney and then pass upon the case before me and say that I was accepting the money as services and not as a bribe and be justified in doing it?" (R. 574). We think this was not fair comment. The Court further practically told the jury to convict the defendants on Count 5 and then if they convicted the defendants on Count 5

to convict on the other counts. The Court says, (R. 575) “. . . but it seems to me the outstanding count in this indictment is the *Greco* case, Count No. 5. What do we find? \$300 paid to these men and their advocating the matter before the Board. As their advocate they were accepting money to advocate his cause and you can't spell anything else out of it.” We find nothing that commented favorably in behalf of the defendant or lined up his position. The trial judge also made some misstatement of facts in his comments which were unsupported by evidence. The Court said, “In the first place there is no dispute that we have one man here who has *taken an oath of office*.” This is contradicted by the record and by the indictment itself which says that an oath was signed, and it does not appear from the evidence that it was signed before any official authorized to give it. The trial court also said in its comments, “And then we have evidence, undisputed evidence that charges were made and the only dispute between the parties is whether this money *was paid* with the intent to influence his decision or action on any question pending before the advisory board. Was that the purpose? There is no question here as to that.” This was not the issue before the jury at all as to whether this man was paid with the intent to influence the Court's decision, but was asked and received for the purpose of influencing his decision on a matter pending before him. The statement of the Court clearly misstated the issues before the jury to the appellant's prejudice. (R. 571). Nor was the question as stated again by the Court on page 574. The

question is, did they have a right to accept the bribe because it required work? That was not the question before the jury at all, and it was a misstatement of the issues before the jury to the extreme prejudice of the appellant.

THE TRIAL COURT PREJUDICIALLY ERRED IN ITS COMMENTS ON THE FACTS OF THE CASE TO THE JURY.

In the Federal Court the Judge charged the jury regarding the facts of the case and commented on the evidence. Such comments are regarded as a part of the trial judge's charge. The rule regarding such a charge is that it must be fair and impartial to both sides, and analyze the evidence from the standpoint of both sides. The charge which is one-sided, or which is not fair and impartial violates this fundamental rule.

It cannot be said that the following comments of the Judge were a fair and impartial charge to the jury. The court said to the jury "In the first place there is no dispute that we have one man here who has *taken* (misstatement of fact) an oath of office, to faithfully perform his duties as a member of the Rent Advisory Board. It was also contained *in that same statement* that he was to perform those services without any charge." There is nothing in the statement of his oath that he was to perform any services without any charge. There is no statement in the statute forbidding a charge

for services other than to the government of the United States.

The court further said "Notwithstanding, this individual *agreed to make no charges*, he nevertheless did." (R. 71). We find nowhere in the records of this case nor in the statutes that Cly agreed to make no charges to private persons. The statute is certainly silent, on whether there could be reimbursement for expenses, stenographic labor and other appurtenances attached to the same for typing and copying any documents. Even in court it is expected that the party who receives the benefits will pay for it. There is nothing in the law which justifies the Trial Court's comments to the jury in this respect.

It appears that the case against Hill was dismissed and against Cly was prosecuted. The Court took occasion to comment and debate with defense counsel on this matter. Whether one defendant could be convicted of accepting a check when the other defendant accepted it, and had his case dismissed was a question for the jury to decide and not for the court to argue that it did not make any difference.

The Court further says that considerable point was made that Mr. Koepke authorized the defendant and Mr. Hill, formerly the defendant, to make this charge. The Court said: "Neither Mr. Koepke, nor anybody else, could authorize this defendant to violate the law." That assumes that the law forbids making a charge. We find nothing in the law that forbade making a charge, we only question whether the charge was for

the purpose of influencing official action. We think it was error for the Court to assume that it was a violation of the law, the very fact in dispute.

The Court further says that both Mr. Hill and Mr. Cly testified that Mr. Koepke told him that—and it is a question of fact for you to determine—did he tell them that? Does their conduct indicate that he told him that? They testified he did, and that Mr. Koepke denied it and he fired them for it. And did Mr. Cly get mad about it? No. He writes him a letter and says, “Dear Ben: I tender my resignation, and, in effect, he said that the contracting business is picking up.” Does that indicate that a man has been accused of wrong-doing and resented it? This is not fair comment on the evidence, it is an argument in answer to defense counsel’s argument. Then the Court continued to say that they were amateurs. That is another defense for them, they are amateurs. There is always an amateur in a crime. There is always a first offense, but that is no excuse. That may be a pleading for leniency and also for your sympathy. The question is, did they have a right to accept a bribe because it required work? Would I be justified because I don’t think I am getting paid enough to accept money from litigants and then say it was simply for my services?”

We respectfully submit this as an unfair comment of prosecution’s argument.

The comments on the evidence were one-sided and suggested the defendants as having possibly committed

another crime, was argumentative in favor of the prosecution, and the judge told them that defendant's argument was no defense. The judge further told them that if the jury didn't think that the defendant was guilty on Count Five, then they should acquit the defendant of all the other counts. Put it in reverse of this, if they thought the defendant was guilty of Count Five, they should find him guilty of the other counts.

The Court said if there is any count in the indictment the defendant is guilty of, it is certainly Count Five, providing, of course, there was found there an attempt to accept money to influence his conduct as a member of that Board. Strictly speaking, he was not charged with intent to accept money to influence his conduct *as a member of the Board* in advising the Housing Expediter. That part of the instructions virtually told the jury to find the defendant guilty.

There was no analysis of the evidence in favor of the defendant, as is required by the decisions on comments, Judge to the jury.

These "comments" virtually deprived the defendant of trial by jury and took from him the privilege of testifying before a jury and having the jury pass upon his innocence or guilt.

For which errors we pray for reversal.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant.

No. 12968.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONTE CLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

ERNEST A. TOLIN,

United States Attorney,

WALTER S. BINNS,

Chief Asst. United States Attorney,

VINCENT N. ERICKSON,

Assistant United States Attorney.

312 North Spring Street,

Los Angeles 12, California,

Attorneys for Appellee

FILED

NOV 16 1951

TOPICAL INDEX

	PAGE
Preliminary statement	1
Jurisdictional statement	2
Statement of the case.....	4
A. General background facts.....	4
B. Facts regarding Count Three.....	11
C. Facts regarding Count Four	13
D. Facts regarding Count Five.....	14
E. Facts regarding Count Seven.....	17
F. Facts regarding Counts Eight and Nine.....	19
G. Facts regarding Count Eleven.....	21
Argument	23

I.

The indictment sufficiently alleged and the evidence sufficiently showed that appellant was a person acting for and on behalf of the United States under or by virtue of the authority of an agency of the Government.....	23
A. The indictment sufficiently stated an offense against the laws of the United States.....	23
B. The evidence sufficiently showed that appellant as a member of Local Advisory Board No. 8 was a person acting for and on behalf of the United States in an official capacity, within the bribery statutes involved.....	26

II.

The gist of the offense charged in this case was the acceptance of money with the understanding that appellant's official conduct would be influenced.....	28
--	----

ii.

PAGE

- A. It was immaterial that the Housing Act did not expressly proscribe bribery..... 28
- B. It was immaterial whether or not the bribery resulted in rental increases for the property owners who paid fees to Cly..... 29
- C. In a charge of accepting a bribe the degree of receptivity of the person giving the money is immaterial..... 31
- D. In the offense of bribery it is immaterial whether the official action sought to be influenced was right or wrong 32

III.

- The action to be affected by the bribe was a part of the established procedure of rent advisory boards and was consistent with the authority of the office of Housing Expediter..... 33

IV.

- There was sufficient competent evidence that the matters in which appellant accepted monies were matters pending before him in his official capacity as a member of Rent Advisory Board No. 8..... 34
- A. The scope of the Appellate Court in reviewing the sufficiency of the evidence to support the verdict..... 34
 - 1. The evidence must be viewed in the light most favorable to the Government..... 34
 - 2. The weight and credibility of the evidence is for the jury to determine..... 35
 - 3. The only question presented is whether, viewed in the light most favorable to the Government, there was any substantial evidence to support the verdict 36

- B. There was substantial evidence supporting the verdict which showed that the matters in which appellant took bribes were matters pending before him in his official capacity as a member of Rent Advisory Board No. 8.... 37
1. By definition the word "pending" means any action begun but not yet completed..... 37
 2. The landlord's application for rental increase became "pending" before appellant in his official capacity when he agreed to assist the landlord for a fee 38
 3. There was substantial evidence showing that the Chapman matter (Count Three) was pending before appellant in his official capacity..... 40
 4. There was substantial evidence showing that the Neiditch matter (Count Four) was pending before appellant in his official capacity..... 42
 5. There was substantial evidence showing that the Greco matter (Count Five) was pending before appellant in his official capacity..... 42
 6. There was substantial evidence showing that the Wescoatt matter (Count Seven) was pending before appellant in his official capacity..... 44
 7. There was substantial evidence showing that the Preston (Count Eight) and Barker (Count Nine) matters were pending before appellant in his official capacity 45
 8. There was substantial evidence showing that the Cohen matter (Count Eleven) was pending before appellant in his official capacity..... 46

V.

There was sufficient competent evidence on the issue of appellant's criminal intent and the trial court properly admitted testimony of Earl J. Templeton on this issue of intent.....	47
---	----

VI.

The trial court made proper comments and properly instructed the jury	49
A. The trial court properly instructed the jury when it read the entire bribery statute.....	49
B. The trial court followed approved federal practice in its comments upon the evidence and its expression of opinion on the evidence.....	50
C. The trial court made a proper comment during the trial	52

VII.

Conclusion	53
------------------	----

Appendix :

A. Summation of counts.....	App. p. 1
B. Data regarding exhibits.....	App. p. 2
C. Statutes involved	App. p. 3

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Cohen et al. v. United States, 144 F. 2d 984; cert. den., 65 S. Ct. 440, 323 U. S. 797, 89 L. Ed. 636; withheld, 65 S. Ct. 441, reh. den., 65 S. Ct. 586, 324 U. S. 885, 89 L. Ed. 1435	30, 33
Cole v. Arkansas, 333 U. S. 196.....	47
Cole et al. v. United States, 144 F. 2d 984.....	29
Coplin v. United States, 88 F. 2d 652.....	35
Corson v. United States, 147 F. 2d 437.....	49
Craig v. United States, 81 F. 2d 816; reh. den., 83 F. 2d 450; cert. den., 298 U. S. 690; reh. den., 299 U. S. 620.....	36
Craig, Ex parte, 274 Fed. 177.....	37
Crinnian v. United States, 1 F. 2d 643.....	24
Cunningham v. Springer, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662	35
Daniels et al. v. United States, 17 F. 2d 339; cert. den., 274 U. S. 744.....	32
De Jonge v. Oregon, 299 U. S. 353.....	47
Fall v. United States, 60 App. D. C. 124, 49 F. 2d 506.....	28, 48
Gardzielewski v. United States, 315 U. S. 823.....	36
Henderson v. United States, 143 F. 2d 681.....	34, 47
King v. United States, 112 Fed. 988.....	24
Lavender v. Kurn, 66 S. Ct. 740, 327 U. S. 645, 90 L. Ed. 916	36
Malatkofki v. United States, 179 F. 2d 905.....	25, 31
Midkiff v. Colton, 242 Fed. 373.....	37
O'Leary v. United States, 160 F. 2d 333.....	37
Pasadena Research Laboratories v. United States, 169 F. 2d 375	35
People v. Glass, 158 Cal. 650.....	48
People v. Washburn, 104 Cal. App. 662.....	48
Quercia v. United States, 289 U. S. 466.....	50, 51

	PAGE
Reconstruction Finance Corporation v. Bankers Trust Company, 63 S. Ct. 515, 318 U. S. 163, 87 L. Ed. 680.....	35
Screws v. United States, 325 U. S. 91.....	49
United States v. Baneth, 155 F. 2d 978.....	48
United States v. Behrman, 258 U. S. 280, 42 S. Ct. 303, 66 L. Ed. 619.....	24
United States v. Bordonaro, 253 Fed. 477.....	27
United States v. Canella, 63 Fed. Supp. 377; affd., 157 F. 2d 470	24, 28, 29
United States v. Gardzielewski, 125 F. 2d 138.....	36
United States v. Holmes, 168 F. 2d 888.....	27
United States v. Levine, 129 F. 2d 745.....	27
United States v. Marcus, 166 F. 2d 497.....	23
United States v. Murdock, 290 U. S. 389.....	50, 51
United States v. 2,049.85 Acres of Land, More or less in Nueces County, Texas, 49 Fed. Supp. 20.....	37
Whitney v. United States, 99 F. 2d 327.....	28, 32

STATUTES

Act of Mar. 4, 1909, Chap. 321, Sec. 340 (35 Stat. 1153).....	2
Act of Mar. 3, 1911, Chap. 231, Sec. 24 (36 Stat. 1091).....	2
Act of June 25, 1948, Chap. 646 (62 Stat. 929).....	3
Act of June 30, 1948, Chap. 775, Sec. 101 (62 Stat. 1197).....	25
Criminal Code, Sec. 117.....	24
United States Code (New Ed.), Title 18, Sec. 202.....	1, 4, 24, 27
United States Code (1946 Ed.), Title 18, Sec. 91.....	25
United States Code (1946 Ed.), Title 18, Sec. 207.....	1, 4, 24, 50
United States Code, Title 5, Sec. 16.....	25
United States Code, Title 18, Sec. 546.....	2
United States Code, Title 18, Sec. 3231.....	3
United States Code, Title 28, Sec. 41(2).....	2
United States Code, Title 28, Sec. 1291.....	3
United States Code, Title 28, Sec. 1294(4).....	3
United States Code Appendix, Title 50, Sec. 1822a.....	25

TEXTBOOKS

Black's New Dictionary (3rd Ed.), p. 1345.....	37
--	----

No. 12968.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONTE CLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Preliminary Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered April 13, 1951, by which the appellant was adjudged guilty of the offense of bribery after return by a jury of a verdict of guilty as to Counts Three, Four, Five, Seven, Eight, Nine and Eleven.¹ Appellant was charged in Counts Five and Eleven with a violation of 18 U. S. C. (1946 Edition), Section 207 [Clk. Tr. 6, 9], and in Counts Three, Four, Seven, Eight and Nine with a violation of 18 U. S. C. (new Edition), Section 202 [Clk. Tr. 4, 5, 7, 8]. The District Court sen-

¹Clerk's Transcript (hereinafter referred to as Clk. Tr.), p. 37.

tenced the appellant to eighteen months in a penitentiary as to each of said counts, to run concurrently [Clk. Tr. 37 and 38]. In addition, fines in varying amounts were assessed as to each of said counts, but appellant is not to stand committed for failure to pay said fines.

Notice of appeal to this court was filed by appellant on April 13, 1951 [Clk. Tr. 39 and 40].

Jurisdictional Statement.

A. The District Court had jurisdiction to try the offenses¹ committed prior to September 1, 1948, under:

18 U. S. C., Sec. 546² (Mar. 4, 1909, Chap. 321, Sec. 340, 35 Stat. 1153), which provides as follows:

"The crimes and offenses defined in this title shall be cognizable in the district courts of the United States as prescribed in Section 41 of Title 28."

And under:

28 U. S. C., Sec. 41, Subdiv. 2 (Mar. 3, 1911, Chap. 231, Sec. 24, 36 Stat. 1091) which provides as follows:

"*Original Jurisdiction.* The district courts shall have original jurisdiction as follows:

(1) * * *

(2) *Crimes and offenses.* Second. Of all crimes and offenses cognizable under the authority of the United States."

¹Of bribery, see Appendix C for the bribery statutes involved.

²All references in this brief to 18 U. S. C. and 28 U. S. C., except where otherwise indicated, are to the old edition, *i. e.*, to the 1940 edition preceding (new) title 18 and (new) title 28, each of which became effective September 1, 1948.

B. The District Court had jurisdiction to try the offenses committed subsequent to September 1, 1948 under (new) 18 U. S. C., Sec. 3231, which provides as follows:

“The district courts of the United States shall have the original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof. June 25, 1948, c. 645, 62 Stat. 826.”

C. This Court has jurisdiction of the appeal under (new) 28 U. S. C., Sec. 1291 (June 25, 1948, Chap. 646, 62 Stat. 929), which provides as follows:

“Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, * * * except where a direct review may be had in the Supreme Court.”

And under (new) 28 U. S. C., Sec. 1294, Subdiv. (4), which provides in pertinent part as follows:

“Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district.”

Statement of the Case.

A. General Background Facts.

The appellee contraverts the appellant's opening statement of the case¹ for the reason that it is argumentative, interpretative, incomplete and the facts set forth are put in the light most favorable to the appellant. Some of the alleged facts therein recited are contrary to the finding of the jury. There will be no attempt by appellee to argue the case in any portion of this brief, except that portion devoted to argument. The following summary of the evidence pertinent to the questions before this court is submitted as a more objective synopsis.

The indictment filed in this case on August 10, 1950, jointly charged Monte Cly and Lindsey T. Hill in fourteen counts with a violation of Sections 18 U. S. C. 207 and (new) 18 U. S. C. 202, officials asking and accepting bribes. In February, 1951, the case against defendant Hill was dismissed by the District Court on motion of the Government [Rep. Tr. 244].

The appellant Monte Cly was a resident of the Bay Area, and for twenty years had been in the real estate and general contracting business in that section.² The jurisdiction of Rent Advisory Board No. 8 included that coastal section of Los Angeles County known as the Bay Area [Rep. Tr. 187, see Map, Plaintiff's Exhibit 11]³ and there were approximately 75,000 rental units in this area [Rep. Tr. 312]. Cly maintained a real estate and general con-

¹Appellant's Opening Brief (hereinafter referred to as App. O. B.), pp. 8-14, incl.

²Reporter's Transcript (hereinafter referred to as Rep. Tr.), pp. 372, 373.

³Plaintiff's Exhibits will hereinafter be referred to as Ptf's Ex.

tracting office at 32 Avenue 17, Venice, California. Appellant and Lindsey T. Hill used this office in connection with rent advisory matters [Rep. Tr. 200, 463].

On November 6, 1947, Cly signed the Oath of Office as a member of Rent Advisory Board No. 8, Los Angeles Defense Rental Area, and at the trial both sides stipulated to the fact that Cly took the Oath of Office and signed it on November 6, 1947 [Rep. Tr. 239, 445; see Oath of Office in Ptf's Ex. 14].

In November, 1947, four members of the Advisory Board No. 8 had been appointed but the Board could not function until it had five members so Hill was appointed [Rep. Tr. 462]. The full membership of Advisory Board No. 8 included Lindsey T. Hill, Monte Cly, Mr. O'Brien, Mrs. Smith and Mrs. Wilke [Rep. Tr. 185, 389, 390]. Hill took his oath of office on January 12, 1948 [Rep. Tr. 183, 238; see Oath of Office in Ptf's Ex. 14]. Hill immediately became Chairman of this Board [Rep. Tr. 250] and the Board organized for business about the 12th of January, 1948 [Rep. Tr. 376, 394].

The Board usually held a meeting once every two weeks [Rep. Tr. 184] and this meeting was held at the Area Rent Office, 1206 Santee Street, Los Angeles [Rep. Tr. 185, 350]. The only persons present at the Board meetings were the members and the Secretary, Mrs. June Luscher [Rep. Tr. 185, 186]. Outsiders, such as tenants and landlords, were not allowed at the meetings and Hill testified, "I think during the entire period of time only two came in protesting, but they weren't allowed at the meetings." [Rep. Tr. 186].

The advisory board members served without compensation [Rep. Tr. 303] and both Hill and Cly knew this [Rep. Tr. 215.] The only provision for payment of

money to them was for mileage and per diem whenever they were away from their official station overnight [Rep. Tr. 306]. The boards were provided with a secretary-stenographer who was employed by the Area Rent Director in Los Angeles, but who was always available to board members [Rep. Tr. 214, 304]. Mrs. June Luscher was the secretary of all twelve advisory boards in Los Angeles County, including Advisory Board No. 8 [Rep. Tr. 312, 344].

The duties of the secretary consisted of arranging meetings for the board, bringing the files to be considered to the meetings, taking notes of actions of the board at meetings and keeping the files in order [Rep. Tr. 328]. Both decontrol and rent increase matters came before Local Board No. 8 [Rep. Tr. 331]. A carbon copy of the minutes of every meeting was sent to each of the four board members and the original was sent to the Chairman, Mr. Hill [Rep. Tr. 347]. Hill generally took his copy of the minutes to Cly's office [Rep. Tr. 268].

Immediately after the Board was organized for business in January, 1948, there was much newspaper publicity in the Bay Area regarding the fact that an Advisory Board had been set up and that Hill and Cly were members of that Board [Rep. Tr. 250, 376, 394, 442]. As a result, beginning about March, 1948, people began bringing rental problems to Cly's office day and night [Rep. Tr. 376]. Around June of 1948 Hill and Cly agreed between themselves to start charging fees for services rendered to landlords [Rep. Tr. 478, 251]. The agreement was that Hill and Cly were to divide 50-50 whatever moneys were received, regardless of who received them [Rep. Tr. 392]. Cly had the office and connections and would get "clients"

while Hill made out the necessary papers for the landlords [Rep. Tr. 202, 277, 520]. Cly testified that Hill “did most of the work on it, but that is the way we agreed to do it” [Rep. Tr. 392]. They never reported to Koepke or any other official that fees had been collected [Rep. Tr. 283].

Hill and Cly made charges for their services when the units involved were big units and where “we felt we could do some good” [Rep. Tr. 283, 377]. Charges were made in approximately 10% of the cases handled by Hill and Cly [Rep. Tr. 283, 378]. Cly estimated that 150 to 200 cases were handled free, and 15 to 17 cases where fees were charged [Rep. Tr. 378]. Cly testified that “there may be a few more you don’t have” charged in the indictment [Rep. Tr. 470]. No record was kept of the cases where charges were made [Rep. Tr. 378, 483]. Hill and Cly never divided any of these moneys with any other Board member [Rep. Tr. 282]. Both tenants and landlords came to Cly’s office, or contacted Cly for assistance [Rep. Tr. 377, 470], and the percentage was approximately 60% landlords and 40% tenants [Rep. Tr. 250]. Cly testified no charges were ever made to a tenant but that landlords “more or less voluntarily” paid them. “Yes, we accepted it (money from landlords). We had to do something to keep living, yes, we accepted it.” [Rep. Tr. 470.]

Mr. Ben C. Koepke was the Area Rent Director, Los Angeles Defense Rental Area, during the entire period that Cly and Hill were members of Rent Advisory Board No. 8, and held such position until Los Angeles was decontrolled on December 30, 1950 [Rep. Tr. 528]. Mr. Koepke testified regarding the organization, function and purpose of the local rent advisory boards in general, and

Advisory Board No. 8 in particular [Rep. Tr. 306-312, incl.].

Under the Rent Control Act either a tenant or a landlord could file his petition for relief with the Los Angeles Office of the Area Rent Director [Rep. Tr. 308]. The Los Angeles office would in the normal course then process the application, make the necessary inspections, and decide upon the order that should then be issued in the particular case. Generally 30 to 60 days elapsed between the filing and the resulting order [Rep. Tr. 209]. When the resulting order from Mr. Koepke's office was unsatisfactory to the petitioner, such aggrieved person could appeal to his local Advisory Board [Rep. Tr. 306]. The intention when the local advisory boards were set up in 1947 was for the Area Rent Director to have an opportunity to pass on a petition before the matter ever came before an Advisory Board [Rep. Tr. 307]. It was never intended that advisory boards should file petitions on behalf of tenants or landlords. The function of the local advisory boards was purely to advise and make recommendations to the Area Rent Director in "hardship" cases [Rep. Tr. 307, 308]. If these recommendations were "anywhere reasonable" Koepke's office generally followed them [Rep. Tr. 309].

The application for relief by a tenant or landlord could be brought before the local advisory boards for consideration and recommendation by either having the petitioner by letter request the clerk of the Board to have the Board review the case [Rep. Tr. 308], or by having a member of the advisory board request the clerk of the board to place a particular case on the agenda for their next regular meeting [Rep. Tr. 309]. Cly and Hill "very often" requested that certain matters be placed on the agenda

for consideration and Mrs. Luscher, the Clerk and Secretary of the Board would do so [Rep. Tr. 329, 258]. Cly and Hill at various times requested Mrs. Luscher to put on the agenda both "direct applications to the rent office or applications for review by the board." She could not recall of any other member of Advisory Board No. 8 who ever requested her to place either or both an application for original consideration or an application for review on the agenda for a board meeting [Rep. Tr. 354].

Hill testified that he and Cly requested that "deserving" cases be brought before Advisory Board No. 8, and in every instance where such requests were made they were granted by Mrs. Luscher [Rep. Tr. 258, 271]. Cly testified that he never made an unfavorable recommendation on a matter in any case where a fee had been received [Rep. Tr. 465] and he admitted that cases in which fees had been accepted came before the board in regularly called meetings [Rep. Tr. 465, 421, 434, 435]. Hill testified that at the Board meetings in cases where fees had been accepted "we would always recommend it (the action requested) and we would state why we were recommending it; that we had looked it over and we felt that it was—that they should get a raise." [Rep. Tr. 214.]

In connection with their operations Cly and Hill would visit and inspect the properties involved in a particular case in which a fee was ultimately collected and then would check the comparable rentals on adjoining properties at the Los Angeles Rent Director's Office [Rep. Tr. 256, 391]. The duties of an advisory board member did not require them to personally inspect property [Rep. Tr. 269]. The other three members of Advisory Board No. 8 inspected property only a half dozen times at the most [Rep. Tr. 393, 282].

Cly and Hill drove down to the Area Rent Director's Office, 1206 Santee Street, Los Angeles, practically every day. Cly's car was used because Hill did not have a car and Cly would drive Hill to Los Angeles and bring him back [Rep. Tr. 391]. Cly testified that money was taken only after the property had been "checked over," comparable rents noted, he and Hill felt an increase was justified, and they knew how much the work would be [Rep. Tr. 410, 411]. Cly testified he and Hill had access to files in the Los Angeles office of the Rent Director [Rep. Tr. 497] and Mrs. Luscher cooperated well with them [Rep. Tr. 499].

Cly's resignation was by letter to Rent Director Koepke dated January 13, 1949, and his resignation was effective as of January 15, 1949 [Rep. Tr. 457, see letter in Ptf's Ex. 14]. This resignation was at Koepke's request [Rep. Tr. 456-459, incl.] and had been preceded by conversations between Cly and Koepke regarding Cly's accepting fees [Rep. Tr. 523, 524, 317, 318, 319].

Mrs. Luscher testified Hill and Cly were "always" present at board meetings [Rep. Tr. 330] and a majority of three was sufficient to carry any recommendation at a meeting [Rep. Tr. 214]. Hill verified this statement [Rep. Tr. 184]. Cly testified "toward the last there was only three" board members present at most meetings, Hill, Cly and Mr. O'Brien [Rep. Tr. 396]. Certain members of the Advisory Board No. 8 tried to resign but Cly testified, "We tried to hold them—we tried to hold the Board together." Only Hill and Cly resigned [Rep. Tr. 471] in early 1949. Cly never took steps to resign even though the job became burdensome [Rep. Tr. 456].

Cly admitted that he was told at the time he agreed to become a member of Advisory Board No. 8 what his

duties would be and how much time would be required [Rep. Tr. 375]. Cly also admitted he received a handbook of instructions to advisory board members [Rep. Tr. 443, 444].

B. Facts Regarding Count Three.

Mr. and Mrs. Claude W. Chapman owned an apartment house at 407 Ocean Front, Venice, California [Rep. Tr. 14]. Mr. Chapman telephoned Cly's office one day and made an appointment to come down the following day with his wife to discuss his rental problem [Rep. Tr. 16]. Mr. and Mrs. Chapman went to Cly's office and there had a conversation in the presence of Hill, Cly and the office secretary [Rep. Tr. 16]. Mr. Chapman said the date of this transaction is the date on which the \$50 check was given to Monte Cly, December 6, 1948 [Rep. Tr. 19, Ptf's Ex. 1]. Cly recalls having a conversation with Chapman but he could not fix the date as December 6, 1948, merely because that was the date on the check [Rep. Tr. 410]. Cly testified that the date of the conversation "could have been after Mr. Hill was down there and knew what he was going to do or how much he was going to do in there, because it wouldn't—the check and the date would be after the time it had been checked over and gone through before anything would be done" [Rep. Tr. 410].

Prior to the formation of Advisory Board No. 8, Chapman had applied for a rental increase to the O. P. A. [Rep. Tr. 25]. He gave all of these papers to Hill and Cly at the time of the December 6, 1948, conversation [Rep. Tr. 16]. Both Hill and Cly were present when one of them stated to Chapman that they would fix the

papers up and would send the papers to the Rent Control Director and that Chapman would be given a \$15 increase on each apartment [Rep. Tr. 20]. The price asked for by Hill and Cly was \$10 per apartment and Chapman had 12 apartments [Rep. Tr. 21]. Chapman objected to this charge and replied that he "could get the apartment house people to do it for nothing" [Rep. Tr. 28]. Hill replied to this: "'it will have to go through our Board' and that it would get quicker action this way" [Rep. Tr. 29]. Chapman agreed to pay \$50 and his wife wrote a check for this amount payable to Monte Cly [Rep. Tr. 21, 209, Ptf's Ex. 1]. Hill testified at the trial that he had never seen this \$50 check before [Rep. Tr. 210].

Hill prepared Chapman's application for a rental increase and submitted it to the Los Angeles Office of the Area Rent Director [Rep. Tr. 548, see Ptf's Ex. 18], and in preparing this application Hill checked the files in the office of the Los Angeles Rent Director to see what the comparable rentals in this area were [Rep. Tr. 548]. Cly's office was only eight blocks from the Chapman apartment house [Rep. Tr. 414] and he knew the comparative values in the area very well [Rep. Tr. 415]. After promising to make out the papers in this matter Hill told the Chapmans that they would hear from Cly and Hill later [Rep. Tr. 26]. Following this conversation in Cly's office, Hill came to the Chapman apartment house two or three times and an inspector from the Area Rent Director's office also inspected Chapman's premises [Rep. Tr. 38].

C. Facts Regarding Count Four.

Mr. and Mrs. Harry Neiditch owned an apartment house at 1341 14th Street, Santa Monica [Rep. Tr. 69], and there were from 14 to 15 apartments in the building [Rep. Tr. 218]. Cly recalled that Mrs. Neiditch came into his office. Some one had told her to come down to see Cly and Hill in regard to making out papers for rental increases on her place and she asked Cly who handled such matters [Rep. Tr. 416]. Mrs. Neiditch saw both Cly and Hill [Rep. Tr. 73]. Hill testified that Cly asked him to look over this property and Hill later did.

Mrs. Neiditch recalls the conversation in Cly's office with Hill and she places the date of the conversation as the date of the \$250 check, payable to cash, which she gave to Hill on that occasion. The date of the check is November 15, 1948 [Rep. Tr. 76, Ptf's Ex. 5]. Hill definitely recalls receiving a \$250 check from Mrs. Neiditch and he identified the check [Rep. Tr. 219, Ptf's Ex. 5]. He recalls that he gave Cly one-half the proceeds of this check and he did so approximately three minutes after Cly introduced Hill to the Manager of a Venice Bank where the check was cashed [Rep. Tr. 220]. Cly admits receiving one-half the proceeds of this check [Rep. Tr. 418].

The next day Mrs. Neiditch wanted to verify the fact that she had not fallen "into a trap" so she went back to Cly's office where in the window she saw "something about the OPA Board . . . and then I was sure I was dealing with competent people" [Rep. Tr. 76].

Hill inspected the property involved, thought that the apartments merited a rental increase and so advised the Neiditches [Rep. Tr. 218]. Hill obtained the description

of the property and all data and then made up the necessary papers to send to the Area Rent Control Office in Los Angeles requesting an increase [Rep. Tr. 218]. Cly testified that he knew Hill "worked on" this case for two and a half months at least, and that Hill was there at the property at least once a week. Cly denied that he knew this property. "I never went into Santa Monica." [Rep. Tr. 417.] The papers were signed and Hill mailed them to the Area Rent Control Office in Los Angeles [Rep. Tr. 218].

Hill testified that the Board met and considered this case and recommended an increase in rent. Cly was present at this meeting of the Board [Rep. Tr. 221, 264].

D. Facts Regarding Count Five.

Cly testified he was introduced to Don Greco by Hill at Greco's restaurant on Wilshire Boulevard. Cly recalls that he subsequently inspected Greco's property located at 126 Palisades, Santa Monica [Rep. Tr. 419]. This property had six bungalows on it [Rep. Tr. 174]. Hill's best recollection corroborates this meeting in Greco's restaurant, and his subsequent inspection of the property with Cly [Rep. Tr. 198]. Both before and after money was paid by Greco, Cly expressed an opinion to others that Greco's rentals were very, very low and should be raised [Rep. Tr. 420].

Cly went with Hill to these premises more than once and he could not recall whether he and Hill had taken the pictures submitted with Greco's rental application or not, although "sometimes we went out and took pictures" [Rep. Tr. 421].

Greco testified that Hill and Cly visited his house [Rep. Tr. 169, 170] after Greco had already contacted Hill about getting his rents raised. Hill and Cly carefully looked over the property [Rep. Tr. 175]. During the conversation Cly said that the property was well worth the raise and that Greco should get it. "He said they would help me, and at the conclusion he said it would cost me some expense money" [Rep. Tr. 171]. Greco asked how much, Cly said \$300 and Greco thereupon paid \$300 in cash [Rep. Tr. 171, 172, 178]. During this entire conversation Greco presumed Hill was a member of the Rent Advisory Board [Rep. Tr. 172]. A lady had suggested Hill as the person to contact for rental increase relief and for that reason Greco had gone to see him [Rep. Tr. 173].

Hill and Cly both recall that they checked comparable rentals at the Area Rent Director's Office in Los Angeles prior to filing the application for rent increase on behalf of Greco [Rep. Tr. 198, 498, 499]. Hill testified that he did the work in this case but one-half of the \$300 received was given to Cly because "I did the typewriter work, and he being a real estate man knew of clients" [Rep. Tr. 201, 202].

The records of the Area Rent Director's office in Los Angeles indicate that the original rental increase application was signed by Greco on June 29, 1948 [Ptf's Ex. 23]. Hill testified that he believed photographs of Greco's property were furnished to him and that he sent the photographs with the application for rent increase to the Area Rent Director's Office [Rep. Tr. 552].

Hill testified that he made up all the papers filed by Greco with the Area Rent Director's Office [Rep. Tr.

546, Ptf's Ex. 23], and stated that he filed these papers [Rep. Tr. 189] after Cly and Hill visited Greco's home. Inspectors from the Area Rent Director's Office inspected Greco's property two or three times [Rep. Tr. 175]. Hill thinks he accompanied inspectors to the property [Rep. Tr. 192]. Hill testified that "We asked for some inspectors to come out before it went before the Board" [Rep. Tr. 260]. Hill recalls receiving a reinspection letter from the Area Rent Director's Office in regard to this matter [Rep. Tr. 193, Ptf's Ex. 12].

At the time Hill filed Greco's application for rental increase he knew that the matter would come before Rent Advisory Board No. 8 in the future [Rep. Tr. 199]. Greco presumed at the time of his conversation with Hill and Cly that his request for rental increase would come before the Board [Rep. Tr. 178].

Cly recalled that the Greco case was before the Board for "quite awhile" [Rep. Tr. 421, Ptf's Exs. 12, 13, 14] and that he and Hill requested two or three inspections to be made by the Area Rent Director's office [Rep. Tr. 421]. There is no dispute that \$300 in cash was received by Hill and Cly from Greco [Rep. Tr. 421.] Hill corroborates the fact that this case was before the Board [Rep. Tr. 556] and Cly was always present [Rep. Tr. 192]. Cly clearly recalls that Local Advisory Board No. 8 strongly recommended a rental increase on this property [Rep. Tr. 468]. Cly recalled that the Greco matter came before a number of meetings of Rent Advisory Board No. 8 [Ptf's Exs. 13, 14 and 15]: the August 2, 1948, meeting [Rep. Tr. 423]; the August 13, 1948, meeting [Rep. Tr. 422]; the November 1, 1948, meeting [Rep. Tr. 424], and the November 15, 1948, Board meeting [Rep. Tr. 425].

Greco testified that approximately three or four months after he paid the \$300 to Cly and Hill he received permission to raise his bungalow rentals \$5 per month [Rep. Tr. 174, 175].

E. Facts Regarding Count Seven.

Norman Wescoatt in 1948 was made the executor for the estate of Lily Billon and this estate owned property located at 1102 Nowita Place, Venice [Rep. Tr. 129]. There were four units at the Norwita address, but Wescoatt paid Hill and Cly \$100 for services in connection with a total of 11 units [Rep. Tr. 138].

Wescoatt read in the Venice paper that Cly and Hill were members of the Rent Control office [Rep. Tr. 140, 143]. After Wescoatt saw the long line waiting at the Los Angeles Rent Office he paid a call to the Venice office of Cly the address of which he had seen in the newspaper [Rep. Tr. 140, 141]. Wescoatt thought Cly's office was a subsidiary of the Los Angeles Rent Director's office [Rep. Tr. 144]. When he arrived in Cly's office Wescoatt noticed the sign "Monte Cly Building Contractor" but he nevertheless thought that this was the rental office [Rep. Tr. 147]. Wescoatt was told by Cly that he would have to go to Los Angeles because there was no rental control office in Venice. Wescoatt then stated that he wanted to make out an application for rental increase and Cly replied "I will call Mr. Hill, he handles that" [Rep. Tr. 132, 146]. Wescoatt testified that he thought Hill and Cly were past members of the Rent Advisory Board and were doing the work of seeking rental increases as their regular private employment [Rep. Tr. 144].

Wescoatt places the date of this conversation as on or about November 20, 1948 [Rep. Tr. 130]. Hill inspected the property on two or three occasions [Rep. Tr. 137, 224]. After Hill had inspected the property Wescoatt again had a conversation with Cly at which time Cly said "We will do the whole job for \$100" [Rep. Tr. 138]. Wescoatt thereupon paid the \$100 in cash to Cly in the presence of Hill. No receipt was given [Rep. Tr. 133, 138, 225]. Cly recalls this property and testified that he examined the property [Rep. Tr. 429]. Cly inspected the property two or three months prior to the date he received \$100 in cash, November 20, 1948 [Rep. Tr. 430]. Cly came to the conclusion that this property merited the rental increase prior to the date he was paid \$100 on it, and he told Wescoatt the property deserved an increase [Rep. Tr. 431].

Hill testified that he prepared the rental increase application and the attached schedule which was received by the office of the Area Rent Director, Los Angeles [Rep. Tr. 224, 549, Ptf's Ex. 21]. Cly admits filing these papers for Wescoatt, admits receiving \$100 and admits giving Hill one-half of this amount [Rep. Tr. 431].

Hill recalls "quite well" that the Wescoatt matter was brought before local Advisory Board No. 8 and that the Board recommended that a rental increase be granted [Rep. Tr. 224-225]. Cly admits recommending a rental increase in this case [Rep. Tr. 431]. Hill testified that Cly was present and that he was sure that Cly voted for the rent increase "because it took a majority of the—lots of times the others were against us so we would turn it down. It took three of us to pass a recommendation." [Rep. Tr. 225.]

Approximately three months after the payment of \$100 to Hill and Cly, Wescoatt received notification from the Area Rent Director that a rental increase had been allowed on his units from \$25 per month to \$27 per month per unit [Rep. Tr. 136, Ptf's Exs. 6, 7, 8, 9].

F. Facts Regarding Counts Eight and Nine.

Mrs. Mabel Preston was ill and unable to testify at the trial regarding her dealings with Cly and Hill but her sister, Mrs. Frances Barker, did testify. Mrs. Preston owned the properties referred to in Count Eight of the Indictment. Mrs. Barker owned the properties referred to in Count Nine of the Indictment. The two sisters jointly owned the property at 543-549 Lincoln Boulevard, Santa Monica, California [Rep. Tr. 154].

Mrs. Barker testified that she and her sister read an article in a Santa Monica newspaper that Cly's office was a branch of the Los Angeles Rent Control office. The article gave the address of Cly's office and designated that address as the place for "hardship and hardluck cases" [Rep. Tr. 156, 167]. Cly admitted that the community knew of him and Hill as being members of Advisory Board No. 8 and further that "these two sisters told us that . . . we helped some friends of theirs" and that they wanted to get their property straightened out [Rep. Tr. 507, 508]. Mrs. Barker testified that she understood Cly's office was for hard luck cases and she and her sister went to inquire whether or not they could get rental increases [Rep. Tr. 156]. Mrs. Barker at the time thought Cly and Hill were members of Rent Advisory Board No. 8 [Rep. Tr. 162].

Cly recalled that the first conversation regarding these properties was with one of the sisters when she came to

his office and "stayed there practically all day until I went out and looked at her place on Santa Monica Boulevard." [Rep. Tr. 431, 504, 505.] Cly stated that he had work done on this case in the form of inspecting the property and visiting the rental office in Los Angeles for comparables before any moneys were accepted from either of the sisters [Rep. Tr. 506]. Cly testified that when the money was received from these sisters the rental problem had already been presented to him [Rep. Tr. 505].

The next occasion that Cly had a conversation in this matter was when the two sisters came into his office [Rep. Tr. 505]. Mrs. Barker places the date of this conversation on or about September 4, 1948, in Cly's office in Santa Monica [Rep. Tr. 155]. Cly introduced Hill to the sisters and then Hill left the office leaving Cly with the two sisters [Rep. Tr. 161]. Cly recalls the two sisters "argued" in his office for a good hour and a half [Rep. Tr. 504]. During this conversation Cly told them that there was a chance for a raise in rents and set a price for his services of \$15 per unit. Mrs. Barker had three units and she paid a total fee of \$45 to Mr. Cly [Rep. Tr. 157]. Her sister, Mrs. Preston, owned six units and paid Cly \$90 in the presence of Mrs. Barker [Rep. Tr. 158, 159]. These payments by both sisters were in cash and no receipts were given by Cly [Rep. Tr. 167].

Hill testified that he prepared the applications and schedules for rental increases which were submitted to the Area Rent Director's office in Los Angeles and he identified papers in the file from that office as having been prepared by him [Rep. Tr. 544, Ptf's Ex. 20]. Hill also stated he visited the Los Angeles office of the Area Rent Director to investigate comparable rentals in the vicinity of the properties involved in Counts Eight and

Nine [Rep. Tr. 550]. Cly admitted that papers were filed with the Area Rent Director on behalf of these sisters and stated that these properties "could have come up before the Board but I don't recall that" [Rep. Tr. 505]. In his testimony in connection with this case Cly testified "We do quite a bit of that (going to the Santee Street office of the Area Rent Director, making applications, filling out papers, inspecting property) even before we accept a fee" [Rep. Tr. 506].

Hill stated that he saw these sisters regarding their properties once a week for a year [Rep. Tr. 550].

The sisters received authorization from the Area Rent Director, Los Angeles, California, in April or May, 1949 to increase the rentals on certain of the properties involved [Rep. Tr. 159, 160].

G. Facts Regarding Count Eleven.

Mr. and Mrs. Frank Cohen owned rental property located at 209 and 209½ Clubhouse Drive, Venice, California. This property of the Cohen's was located two and one-half blocks from Cly's Venice office where he had a contracting and real estate business [Rep. Tr. 233]. Mr. Frank Cohen died October 19, 1950 [Rep. Tr. 124]. Mrs. Cohen testified that she remarried and is now Mrs. Rose Rubin [Rep. Tr. 122].

Cly testified that the Cohens brought all of their papers to Cly's office at Cly's suggestion and he had Hill present and all the papers were read. At all times after that meeting Hill handled the matters [Rep. Tr. 433]. Cly testified that this matter "started . . . around June (1948)" [Rep. Tr. 500].

There is no dispute that money was received from the Cohens in this matter by Cly. Cly testified that he recalls the amount to be \$10 to \$15 [Rep. Tr. 435] although the price agreed upon by the parties was \$50 [Rep. Tr. 436]. After Hill had testified that \$35 had been received from the Cohens, Cly later testified "somewhere in that neighborhood, yes." [Rep. Tr. 436.] Cly testified that before any money was received from the Cohens he was of the opinion that the Cohens were entitled to an increase in rent [Rep. Tr. 435].

Hill prepared the application and schedule filed with the Area Rent Director, Los Angeles, requesting the rental increase and he identified papers in the file from that office as having been prepared by him [Rep. Tr. 543, Ptf's Ex. 19]. Hill recalls that he talked to Mrs. Luscher, Clerk of Advisory Board No. 8, about the Cohen case and that after the overcharge by the Cohens was cleared up he filed the necessary papers requesting a rental increase [Rep. Tr. 550, 551].

Cly believed that an application for a rental increase was filed in this matter [Rep. Tr. 435] with Rent Advisory Board No. 8 and recalled definitely that when the matter came before the Board "We recommended an increase" [Rep. Tr. 434, 435].

Mrs. Luscher prepared the minutes for Advisory Board No. 8, and she identified the minutes of the September 13, 1948, meeting as having been minutes that she prepared [Rep. Tr. 339, Ptf's Ex. 14]. A portion of the minutes of this meeting refer to the property owned by Frank Cohen and the Board recommended an increase in rent [Rep. Tr. 339, 340].

ARGUMENT.

I.

The Indictment Sufficiently Alleged and the Evidence Sufficiently Showed That Appellant Was a Person Acting for and on Behalf of the United States Under or by Virtue of the Authority of an Agency of the Government.

A. The Indictment Sufficiently Stated an Offense Against the Laws of the United States.

Count One of the Indictment was sufficient in its allegation that Cly "On or about Nov. 6, 1947, signed the oath of office as a member of Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area and continued to serve as a board member until his resignation on January 15, 1949 . . . Cly . . . (was) duly appointed pursuant to . . . the Housing and the Rent Act of 1947." This portion of Count One was incorporated by reference into each and every other count of the indictment.

Where the indictment alleges facts which set forth the elements of the offense the indictment is sufficient, even though the allegations are not in the statutory language. *United States v. Marcus* (C. A. 3, 1948), 166 F. 2d 497, 501.

An indictment is sufficient if it alleges facts with sufficient clearness to show a violation of law and to enable the defendant to know the nature and cause of the accusation, and to enable the defendant to plead the judgment, if one is rendered, in bar of further prosecution for the same offense. *United States v. Behrman*, 1922, 258

U. S. 280, 288, 42 S. Ct. 303, 304, 66 L. Ed. 619, and *United States v. Canella* (D. C. Cal., 1945), 63 Fed. Supp. 377, 379, affirmed by this Court in 157 F. 2d 470.

There is no mention of an oath in either of the statutes involved (old) 18 U. S. C, Section 207 or (new) 18 U. S. C., Section 202. The statutes refer to a "person acting for or on behalf of the United States, in an official capacity, under or by virtue of the authority of any department or" agency thereof. In *Crinnian v. United States* (C. A. 6, 1924), 1 F. 2d 643, 645, the court in a case of first impression reviewed the authorities and concluded that the allegation in the indictment that Crinnian was "a federal prohibition agent" was a sufficient allegation that he was at least a "person acting for and on behalf of the United States in any official capacity under or by virtue of the authority of any department or office of the government thereof" within the bribery statute as it then read, Section 117 of the Criminal Code.

In *King v. United States* (C. A. 5, 1902), 112 Fed. 988, 994, an indictment was upheld where the indictment did not specifically, in clear cut terms, charge the official capacity of the defendant at the time he was charged with receiving the bribe in question. However, the court held that, after verdict, there was a sufficient description of the official capacity of the defendant when the indictment alleged that he received the said bribe "with intent to influence his . . . official action in the payment of money . . . which said matter and things . . . were then and there pending before [him], or might be

brought before him in his official capacity, by virtue of the authority vested in him, . . . by the War Department.”

There is no requirement in the basic section on oaths of office (5 U. S. C., 16) for any formalized procedure in the administration of an oath. While the oath must be administered by one authorized to do so, the Congress in 1948¹, empowered any employee in the Office of Housing Expediter, when designated by the Housing Expediter, “to administer to or take from any person an oath” when such instrument was required. There is no question but what Cly was given the oath by an employee of the Los Angeles Housing Expediter’s office.

In the recent case of *Malatkofki v. United States* (C. A. 1, 1950), 179 F. 2d 905, the defendant and another were convicted for giving money to a governmental employee to influence the action of that employee in awarding contracts for the sale of tools to the Veterans Administration. The indictments charged that the defendants gave money to the federal employee with the corrupt intent to influence such employee in awarding government contracts “which matter came before him (the federal employee) in his official capacity.” On appeal the defendants contended that the indictment did not state an offense. The appellants contended that under the statute involved, 18 U. S. C. 91 (1946 Ed), the quoted words were insufficient

¹Chapter 775, Section 101, 62 Stat. 1197, June 30, 1948 (50 App. U. S. C. 1822a).

in that they referred to a past matter and that this was contrary to the statute which, like the bribery statutes involved in the instant appeal, required an intent to influence an official in a matter which may be pending, or a matter which may come up in the future.

The court at page 909 disposed of the appellants' arguments with the prefatory remark that, "On this point, defendants advance what seems to us to be a hypercritical reading of the indictments." The court then discussed the matter, cited cases and concluded that the indictment did state an offense.

B. The Evidence Sufficiently Showed That Appellant as a Member of Local Advisory Board No. 8 Was a Person Acting for and on Behalf of the United States in an Official Capacity, Within the Bribery Statutes Involved.

The evidence clearly showed Cly, at all times involved herein, actively participated in official meetings of Advisory Board No. 8. It was stipulated at the trial that Cly took the oath of office. This stipulation made it unnecessary for the Government to produce evidence regarding the manner of giving the oath and that Cly was duly appointed as alleged in the indictment. The Housing and Rent Law (Appendix C) provided for such position and the duties and responsibilities thereof.

The evidence was undisputed that at all times from November 6, 1947 to January, 1949, Cly attended board meetings and voted on matters at the board meetings and was generally one of the most active, if not the most active, members of Advisory Board No. 8. Cly's mem-

bership on the board was by his own admission, known to the community and his contacts with the community in the seven counts herein were in the capacity of a person acting for or on behalf of the United States in an official capacity.

For cases holding that various persons were persons acting for and on behalf of the United States in an official capacity within bribery statutes the attention of the court is directed to the following:

An employee of the Market Administrator for the New York Metropolitan Milk Marketing area.

United States v. Levine (C. A. N. Y. 1942), 129 F. 2d 745;

A draft board member is an officer or a person acting on behalf of the United States.

United States v. Bordonaro (D. C. N. Y. 1918), 253 Fed. 477.

An OPA investigator could be convicted under (old) 18 U. S. C. 202, as either an officer of the United States or a person acting on behalf of the United States in an official capacity.

United States v. Holmes (C. A. 3, 1948), 168 F. 2d 888.

It is therefore submitted that the evidence sufficiently showed that at all times mentioned in this case Cly was a person acting for and on behalf of the United States in an official capacity.

II.

The Gist of the Offense Charged in This Case Was the Acceptance of Money With the Understanding That Appellant's Official Conduct Would Be Influenced.

The gist of the offense charged is the acceptance of money with the understanding that Cly's official conduct should be influenced.

As the District Court stated in *United States v. Canella*¹ 1945, 63 Fed. Supp. 377, 379:

"The gist of the offense is not the execution of the agreement for which the bribe is taken, but the acceptance of money, contracts or gratuities with the understanding that the officer's (Army officer) official conduct shall be influenced." The court cited as authority *Fall v. United States* 1932, 60 App. D. C. 124, 49 F. 2d 506; *Whitney v. United States* (C. A. 10, 1938), 99 F. 2d. 327.

A. It Was Immaterial That the Housing Act Did Not Expressly Proscribe Bribery.

The argument made by appellant (App. O. B. 15) that the Housing and Rent Act of 1947 did not expressly forbid the taking or acceptance of money for services rendered in connection with the Act is entitled to no weight.

¹Affirmed by this Court in 157 F. 2d 470 (1946).

It is also true that neither the Housing and Rent Act of 1947, nor the Act of 1948, authorized such taking or acceptance of money for services rendered in connection with the Act. Such an argument by appellant overlooks the crime charged. The appellant was charged with acceptance of bribes. This offense is set forth in a statute that is a part of the criminal code and by the very language of the statute it pertains to all officers of the United States or persons in official capacities acting in behalf of the United States. To require Congress to specifically write into every new act or expressly incorporate by reference into every new act a bribery provision would be absurd.

It is submitted that the record clearly shows that the jury had ample basis to support its verdict that Cly accepted money to influence his official conduct as a member of Rent Advisory Board No. 8. Further it is submitted that appellant's argument that the Housing and Rent Acts did not prohibit charges being made for rendering services under the Acts is entitled to no weight.

B. It Was Immaterial Whether or Not the Bribery Resulted in Rental Increases for the Property Owners Who Paid Fees to Cly.

As the above *Canella* case pointed out, the gist of the offense here is the acceptance of money *with the understanding* (emphasis added) that the official conduct shall be influenced.

In *Cole et al. v. United States* (1944), 144 F.2d 984, this Court affirmed a conviction in a case where a member of a

local draft board (Schnee) and a Government appeal agent (Cohen) conspired to ask a bribe from a draftee. The official action to be influenced by the bribe was a recommendation by the local draft board to the Army for an extension of the draftee's furlough. Before the conspiracy was formed the Army had acted favorably on the furlough application. Appellant in the *Cohen* case contended there was therefore no matter pending before Cohen in his official capacity.

This Court rejected this contention and it is submitted that an analogy exists in this case.

As to six counts in this appeal the evidence clearly shows that the matters were before the board in official session, and admittedly acted upon favorably. Only Count Three lacks direct evidence that the matter was acted upon in formal board session. Even in this count, however, there is testimony by Hill that he prepared the papers filed with the Area Rent Director [Ptf's Ex. 18].

It is submitted that it is immaterial to this bribery charge that the evidence did not show Cly was successful in obtaining rental increases in each of the seven counts. Further, appellee submits that even as to Count Three the proof was sufficient to sustain the verdict because Cly and Hill knew when they inspected Chapman's property and accepted the \$50 that if Chapman were not given a rental increase by the Area Rent Director after Hill filed the application, then the Board would have an opportunity to make a recommendation.

C. In a Charge of Accepting a Bribe the Decree of Receptivity of the Person Giving the Money Is Immaterial.

In *Malatkofski v. United States* (C. A. 1, 1950), 179 F. 2d 905, the defendants were convicted of giving money to influence the official action of a federal employee. Defendants' urged in the appeal that the corrupt arrangement to pay the bribe originated with the federal officer and that the jury should have been instructed that the defendants could not be convicted if this were true. The court, on page 918 of the report, disposed of this point in favor of the Government:

“ . . . nothing in the language of the statute suggests that the crime of bribery is negatived if the evidence shows that the first overtures came from the public official indicating that he would be receptive to the tender of a bribe.”

While the facts in the instant appeal are different, the appellant has made the point in this record that the persons who gave Cly the money did so willingly. Appellee does not wish to argue the facts as to whether or not money was given Cly willingly. The jury found that Cly accepted bribes, not fees for services rendered, and it is submitted under the above authority that the degree of receptivity of the person giving the bribe was immaterial.

D. In the Offense of Bribery It Is Immaterial Whether the Official Action Sought to Be Influenced Was Right or Wrong.

In the transcript of this case Cly consistently stated he accepted money to perform "services" for landlords seeking rental increases only on those properties where he felt an increase was deserved. He appears in this record as a modern day "Robin Hood." Cly himself testified to the consistency of his position when he stated that he never made an unfavorable recommendation at a Board meeting in any case where he had accepted a fee [Rep. Tr. 465].

In the recent case of *Daniels et al. v. United States*,¹ 1927, 17 F. 2d 339, cert. den. 274 U. S. 744, this Court restated the well settled principle that in the offense of bribery it is immaterial whether the official action sought to be influenced is right or wrong. In the *Daniels* opinion, on page 343, this Court continued:

"'Nor is a public officer to be held acquitted of the charge of bribery because that which he agreed to accept as a bribe for doing, was no more than he was legally bound to do'" (citing cases).

While this appeal does not concern a public officer who was legally bound to perform a duty, it is submitted that the legal principle applies. This principle applied to this case makes it immaterial that Cly felt that rental increases were deserved in cases where he accepted money.

¹Cited with approval in *Whitney v. United States* (C. A. 10, 1938), 99 F. 2d 327, 330.

III.

The Action to Be Affected by the Bribe Was a Part of the Established Procedure of Rent Advisory Boards and Was Consistent With the Authority of the Office of Housing Expediter.

The evidence in this case showed that the action to be affected by the bribe was the recommendation of Advisory Board No. 8 to the Area Rent Director that rentals should be increased on the various properties involved in the seven counts. The testimony of Cly himself showed that the established practice of himself and Hill was to inspect the property and investigate comparable rentals before they would accept money to obtain the rental increase. Cly testified regarding certain counts that he was convinced a rental increase was warranted, and he so advised the property owner, even before money was accepted.

The evidence is clear that it was part of the established procedure for Local Advisory Board No. 8 to make recommendations to the Area Rent Director regarding rental increase and decontrol matters. There is no dispute that the law provided for this (see Appendix C). The evidence further showed that such recommendations were accepted by the Area Rent Director whenever they were within reason. Such acceptance of the Area Rent Director was consistent with the authority of his office (See Appendix C). Thus the action to be affected by giving the bribe to Cly was within the bribery statutes under which he was indicted.

In the recent case of *Cohen et al. v. United States* (1944), 144 F. 2d 984, cert. den. 65 S. Ct. 440, 323 U. S. 797, 89 L. Ed. 636, withheld 65 S. Ct. 441, rehearing den. 65 S. Ct. 586, 324 U. S. 885, 89 L. Ed. 1435, this Court affirmed the conviction of Cohen and Schnee on a charge

of conspiring to ask a bribe. At pages 987 and 988 of the report, this Court said:

“To constitute the offense of bribery within the meaning of 18 U. S. C. A., §207, it is sufficient if the action to be affected by the bribe was a part of any established procedure consistent with the authority of a governmental agency (citing cases).”

It is submitted that the action to be affected by the bribe in this case was a part of the established procedure of rent advisory boards and was consistent with the authority of the Office of Housing Expediter and thus was within the statutes involved.

IV.

There Was Sufficient Competent Evidence That the Matters in Which Appellant Accepted Monies Were Matters Pending Before Him in His Official Capacity as a Member of Rent Advisory Board No. 8.

A. The Scope of the Appellate Court in Reviewing the Sufficiency of the Evidence to Support the Verdict.

1. THE EVIDENCE MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT.

The Court has recently restated this well settled rule in *Henderson v. United States* (C. A. 9, 1944), 143 F. 2d 681, 682:

“It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution (citing cases).”

2. THE WEIGHT AND CREDIBILITY OF THE EVIDENCE IS
FOR THE JURY TO DETERMINE.

A verdict rendered on facts which it is the province of the jury to decide is conclusive on appeal. (*Cunningham v. Springer* (1907), 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662; *Reconstruction Finance Corporation v. Bankers Trust Company* (1943), 63 S. Ct. 515, 318 U. S. 163, 87 L. Ed. 680.)

Where the jury by its verdicts rejects as unworthy of belief the evidence offered by the defendant the appellate court is bound thereby. *Coplin v. United States* (C. A. 9, 1937), 88 F. 2d 652, where at page 664, this Court stated:

“With regard to the foregoing testimony, as well as much of the other evidence discussed by the appellants, it should be borne in mind that the question of weight and credibility is for the jury and not for the court.”¹

Appellee agrees that defense counsel correctly stated during the course of the trial [Rep. Tr. 164], that the issue of whether or not the various matters involved in the seven counts herein were “pending before the board” was an issue to be resolved by the jury. The jury believed that they were.

At the trial the testimony of appellant was in conflict with the jury’s general verdict of guilty as to the seven

¹See *Pasadena Research Laboratories v. United States* (C. A. 9, 1948), 169 F. 2d 375, 380, for later statement by this Court on same principle.

counts. The Court of Appeals is bound by a jury's finding of fact based on conflicting evidence. (*United States v. Gardzielewski* (C. A. 7, 1942), 125 F. 2d 138, cert. den. *Gardzielewski v. United States*, 315 U. S. 823.)

Appellant's Statement of the Facts and the detailed statement of facts in his Argument (App. O. B. 21-36, incl.) are stated most favorably to the appellant, contrary to the general finding of the jury, and must be disregarded by the Court.

3. THE ONLY QUESTION PRESENTED IS WHETHER, VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THERE WAS ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

The appellate court's function is exhausted when an evidentiary basis for the verdict of the jury becomes apparent, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Lavender v. Kurn (1946), 66 S. Ct. 740, 327 U. S. 645, 90 L. Ed. 916.

On appeal from the conviction on the ground of errors relating to the sufficiency of the evidence to support the verdict, the duty of the Court of Appeals is limited to the determination of whether there was any substantial evidence to sustain the verdict.

Craig v. United States (C. A. 9, 1936), 81 F. 2d 816, rehearing den. 83 F. 2d 450, cert. den. 298 U. S. 690, rehearing den. 299 U. S. 620.

The function of the appellate court on appeal in a criminal case is ended once it is determined that there was some evidence competent and substantial before the jury fairly tending to sustain the verdict.

O'Leary v. United States (C. A. 9, 1947), 160 F. 2d 333.

B. There Was Substantial Evidence Supporting the Verdict Which Showed That the Matters in Which Appellant Took Bribes Were Matters Pending Before Him in His Official Capacity as a Member of Rent Advisory Board No. 8.

1. BY DEFINITION THE WORD "PENDING" MEANS ANY ACTION BEGUN BUT NOT YET COMPLETED.

In *United States v. 2,049.85 Acres of Land, More or less in Nueces County, Texas* (D. C. Tex., 1943), 49 Fed. Supp. 20, 22, the court found that "pending" meant during, before the conclusion of, or prior to the completion of.

Black's New Dictionary, 3rd Edition, page 1345, defines the word as:

"Begun, but not yet completed; unsettled; undetermined . . . Thus, an action is 'pending' from its inception until the rendition of final judgment." (Citing cases.)

See also:

Ex parte Craig (C. A. 2, 1921), 274 Fed. 177, 187;
Midkiff v. Colton (C. A. 4, 1917), 242 Fed. 373,
382.

2. THE LANDLORD'S APPLICATION FOR RENTAL INCREASE BECAME "PENDING" BEFORE APPELLANT IN HIS OFFICIAL CAPACITY WHEN HE AGREED TO ASSIST THE LANDLORD FOR A FEE.

The evidence showed that Cly and Hill as an established practice sought rental increases for landlords and that he and Hill always voted favorably for rental increases in those cases where a fee had been collected. There was widespread newspaper publicity given the fact that Cly and Hill were members of Rent Advisory Board No. 8 and there was testimony by some witnesses that they first went to Cly's office because they read in the newspapers that the office was the proper place to take rental increase problems. Both Cly and Hill testified that citizens of the area knew them as Board members and that Cly's office was used as their headquarters. Cly had been in the real estate and contracting business in the area for twenty years and was known in the area before he became a member of Advisory Board No. 8. He was known much better than Hill [Rep. Tr. 250]. The number of inquiries by citizens, 60% by landlords and 40% by tenants [Rep. Tr. 250], started to become burdensome on Cly around March, 1948. These inquiries became even more burdensome as time went on, with calls even being made at Cly's home. Yet Cly testified that he at no time offered to resign his position, and in fact he tried successfully to keep the other members of the Board from resigning. His resignation on January 15, 1949, was at the request of the Area Rent Director, Mr. Koepke, after Koepke learned that Cly had been accepting money. There is no evidence in the record that Cly at any time did anything to discourage citizens from continuing to make inquiries at his office or home regarding rental increases.

As a member of an Advisory Board, Cly knew that under the provisions of the Rent and Housing Act in effect during his tenure he would have an opportunity to make his and Hill's recommendation in a case as soon as an application for rental increase was filed with the Area Rent Director. The evidence showed that not only did Advisory Board No. 8 make recommendations in appeal cases, after the Area Rent Director had refused to grant a rental increase, but that Cly and Hill also had matters put on the Board's agenda even before the Area Rent Director had had an opportunity to pass on the matter [Rep. Tr. 354]. Certain of the exhibits in this case show that the rental increase action was *initiated by Rent Advisory Board No. 8* [see Ptf's Exs. 19, 20, 23]. As a Board member, Cly knew that the recommendations for rental increase were accepted by the Area Rent Director where they were reasonable.

The evidence clearly showed that Cly and Hill had their bribery scheme on a very business-like basis. Their agreement was to split the bribes on a 50-50 basis. Cly had the contacts, the office and would get the "clients" [Rep. Tr. 202], while Hill would do all the stenographic work. Hill had no car so Cly drove him down to the Los Angeles Area Rent Director's office practically every day. Cly, in his own testimony supplied the most crucial piece of evidence which established the organized manner of their bribe taking when he said:

" . . . *there would be no charges unless we actually knew what the place is* (emphasis added), and whether we felt satisfied that it was justified for an increase and how much the work would be" [Rep. Tr. 411].

It is submitted that the foregoing summary of the general operation carried on by appellant and Hill makes it clear that when appellant agreed to assist a landlord in obtaining a rental increase and the fee was agreed upon, from that moment on the particular matter was "pending" before Cly in his official capacity as a Board member within the contemplation of the bribery statutes involved.

To accept the logic of appellant's argument to the contrary one would have to say that a judge could only be bribed when he has his judicial robe on, or that a United States Attorney could only be bribed while he was in the Federal Building. The contemplation of the Congress in drafting the bribery statutes involved could not have been to so narrowly construe the meaning of "pending."

Here the evidence is clear that appellant had a lucrative bribery scheme organized and that he and Hill were selective in the cases they accepted. Cly testified money was taken only from landlords and it was paid "more or less voluntarily" [Rep. Tr. 470] by these landlords. Therefore, when the appellant set a fee in a matter he or Hill had inspected the premises and he was prepared to do whatever was necessary to obtain the desired rental increase. Such matter from that moment on became "pending" before him in his official capacity.

3. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE CHAPMAN MATTER (COUNT THREE) WAS PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

Cly himself recalled talking with the Chapmans, but his statement regarding the date of the conversation again showed the organized nature of the bribery scheme [Rep. Tr. 410] and showed that this matter was pending before

him. On that page in the transcript he was shown Mrs. Chapman's \$50 check, dated December 6, 1948, made payable to Monte Cly [Ptf's Ex. 1] and he said:

"No, that wouldn't fix any date. That could have been after Mr. Hill was down there and knew what he was going to do . . . *the check and the date would be after the thing had been checked over . . .*" (emphasis added).

Mr. Chapman testified that both Cly and Hill were present when the price to be charged was discussed. Chapman objected to the price of \$10 per apartment and said he could get the apartment house people to file his papers for nothing. The reply of Hill again gave evidence of the organized nature of the scheme.

"It will have to go through our Board" [Rep. Tr. 29].

The Chapmans agreed to the compromise figure of \$50 and the check was written. Hill testified that he had never seen this check before. The check bears the handwritten endorsement "Monte Cly."

There is no dispute in the facts that Hill filed the necessary application forms for the Chapmans and that Hill made various inspections of the Chapman premises.

It is submitted that there was substantial evidence to support the verdict, and particularly that the Chapman matter was pending before Cly in his official capacity on or about the date on which the check was given to Cly, December 6, 1948.

4. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE NEIDITCH MATTER (COUNT FOUR) WAS PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

The evidence is undisputed that Mrs. Neiditch gave to Hill a \$250 check, dated November 15, 1948, made payable to cash [Ptf's Ex. 5]. Hill testified that he gave Cly half of the proceeds at the bank where the check was cashed [Rep. Tr. 220]. Cly admitted receiving half of this check [Rep. Tr. 418].

Cly testified he knew Hill "worked on" this case for two and a half months at least and that Hill was at this property at least once a week [Rep. Tr. 417]. On this same page in the transcript Cly emphatically denied that he knew this property because "I never went into Santa Monica." However, two pages later in the transcript Cly admitted that he inspected the premises of Don Greco, 126 Palisades in Santa Monica [Rep. Tr. 419, line 22].

Hill testified that he made the necessary inspections and filed the application in this case [Rep. Tr. 218]. Hill further recalled that the Board met and considered this case and recommended an increase in rental [Rep. Tr. 221]. Cly was present at this meeting of the Board [Rep. Tr. 221].

5. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE GRECO MATTER (COUNT FIVE) WAS PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

Appellant does not dispute the fact that \$300 in cash was received in this matter from Don Greco [Rep. Tr. 421]. Appellant himself testified that this matter came

before Rent Advisory Board No. 8 on four occasions [Rep. Tr. 422-425, incl.]. Hill stated that he prepared the application and schedule filed with the Area Rent Director [Ptf's Ex. 23]. A notation in Exhibit 23 indicates that the action for a rental increase was *initiated by Advisory Board No. 8*.

The transcript is replete with admissions by appellant that he inspected this property, felt strongly that a rental increase was warranted, and that he and Hill sent photographs to the Area Rent Director along with this application [Rep. Tr. 421]. In this connection appellant again betrayed the organized nature of his bribery scheme when he said:

"I don't recall whether we were given the pictures or we took the pictures . . . sometimes we went out and took pictures—that is, I went with Mr. Hill and he would take them or I would take them" [Rep. Tr. 421, lines 6-11, incl.]

Greco received permission to raise his rentals approximately three or four months after he paid Cly and Hill the \$300 [Rep. Tr. 174, 175].

It is to be noted that at the close of the plaintiff's case in the trial court, defense counsel made separate motions for acquittal on every count *except Count Five* [Rep. Tr. 365-370, incl.; renewal of motions after both sides rested, Rep. Tr. 566, 567]. At the time counsel was making separate motions he said when he came to Count Five: "We will pass Count No. 5" [Rep. Tr. 368].

6. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE WESCOATT MATTER (COUNT SEVEN) WAS PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

Wescoatt read of Cly and Hill in the Venice newspaper and he went to the address given in the newspaper and there had a conversation with Cly. After learning Mr. Wescoatt's problem, Cly said, "Mr. Hill makes out these papers" [Rep. Tr. 132]. Hill inspected the property and in a subsequent conversation with Hill present, Cly said, "We will do the whole job for \$100." Wescoatt thereupon paid Cly \$100 in cash [Rep. Tr. 138]. Cly admitted this [Rep. Tr. 431].

The evidence is uncontradicted that Hill filed the necessary papers with the Area Rent Director [Ptf's Ex. 21]. Cly admitted that he examined this property two or three months before he accepted the \$100 [Rep. Tr. 430].

Hill testified that this matter was brought before the Board and that a favorable recommendation for a rental increase was made. Cly was present and Hill was sure that Cly voted for the increase "because it took a majority of the—lots of times the others were against us so we would turn it down" [Rep. Tr. 224, 225].

Approximately three months after payment of the \$100 to Cly, Wescoatt received authority from the Area Rent Director to increase rentals [Rep. Tr. 136; Ptf's Exs. 6-9, incl.].

7. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE PRESTON (COUNT EIGHT) AND BARKER (COUNT NINE) MATTERS WERE PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

Mrs. Barker testified that she and her sister, Mrs. Preston, read an article in a Santa Monica newspaper which told of Cly and Hill and gave Cly's office address as the place to go for relief in "hardship and hardluck cases" [Rep. Tr. 167]. Cly admitted that he inspected some property on the day that one of the sisters first came to him, and that on the next occasion both of the sisters came in, he introduced Hill to them, and Hill talked to them [Rep. Tr. 505].

The evidence is uncontradicted that Mrs. Preston paid Cly \$90 in cash and Mrs. Barker paid him \$45 in cash [Rep. Tr. 157-159]. Cly admitted that when he accepted these sums the sisters had already brought their problems to him [Rep. Tr. 505]. This only corroborates previous statements by Cly that money was never accepted until the properties had been inspected and he was certain that he could recommend a raise in rental. Mrs. Barker placed the date of this payment to Cly as on or about September 4, 1948, the date alleged in Counts Eight and Nine of the Indictment.

Hill testified that he prepared the applications and schedules for rental increases in the properties involved in these two counts [Rep. Tr. 544, Ptf's Ex. 20]. It is to be noted in Exhibit 20 that there is a notation that the action for rental increase was *initiated by Advisory Board No. 8.*

Cly admitted that papers were filed on behalf of these sisters and that these properties could have come up before the Board but that he could not recall [Rep. Tr. 505].

In the spring of 1949 the sisters received authorization from the Area Rent Director to raise rentals on certain of the properties involved in these counts.

8. THERE WAS SUBSTANTIAL EVIDENCE SHOWING THAT THE COHEN MATTER (COUNT ELEVEN) WAS PENDING BEFORE APPELLANT IN HIS OFFICIAL CAPACITY.

Cly admitted that the Cohens brought all of their papers to his office, at his request, and with Hill present all the papers were read. Hill handled the entire matter from that time on [Rep. Tr. 433]. Cly recalled that this matter started around June of 1948 and that Hill was doing something on the matter week after week [Rep. Tr. 500]. It is to be noted that the minutes of Advisory Board No. 8 for September 13, 1948, reflect that Cly and Hill were present and that a recommendation for rental increase was made [Rep. Tr. 339].

There is no dispute that \$50 was the price charged by Cly, but Cly recalled that only about \$35 was paid [Rep. Tr. 436].

Hill stated he filed the application and schedule for rental increase and identified the papers [Rep. Tr. 543; Ptf's Ex. 19]. It is to be noted that there appears in Exhibit 19 a statement that the action for rental increase was *initiated by Advisory Board No. 8*.

V.

There Was Sufficient Competent Evidence on the Issue of Appellant's Criminal Intent and the Trial Court Properly Admitted Testimony of Earl J. Templeton on This Issue of Intent.

The legal proposition that separate and distinct acts or offenses are inadmissible in a trial is too well established to require authority. It is equally well established that an exception to this rule exists and that similar and related acts are admissible in a trial when introduced on the issue of intent, motive, or to show a common scheme or plan. This exception was recognized in the recent case from this Court of *Henderson v. United States*, 1944, 143 F. 2d 681, 683.

Appellant in his brief (App. O. B. 38, 39) has cited cases which purport to hold that testimony of Mr. Templeton should not have not have been admitted. The cases cited do not sustain this contention.

In *Cole v. Arkansas*, 1948, 333 U. S. 196, the petitioners were tried and convicted of a violation of Section 2 of a state statute. Their convictions were affirmed by the Supreme Court of Arkansas on the ground that they had violated Section 1, *describing a separate and distinct offense*. The Supreme Court properly held procedural due process had been denied, and thus reversed the conviction. The court cited as authority its earlier decision in *De Jonge v. Oregon*, 1936, 299 U. S. 353, 362. Neither the *Cole* nor the *De Jonge* case have application to this argument of appellant because the issue was due process.

Nor does the California case of *People v. Glass*, 1910, 158 Cal. 650 support appellant's argument. The reason it does not is explained by the court on page 656:

“* * * The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretenses. *It was designed to besmirch and degrade the defendant* * * *” (emphasis added).

In *People v. Washburn*, 1930, 104 Cal. App. 662, 670 the court made it clear that where the facts regarding an alleged former bribery were inconclusive and where such alleged former bribery *was not relevant to any issue in the case*, such evidence had been improperly admitted in the trial court.

In a prosecution of the Secretary of the Interior for bribery, evidence showing a transaction closely related to the transaction on which the prosecution was based was held admissible as bearing upon motive or intent.

Fall v. United States (C. A., D. C. 1931), 49 F. 2d 506, 513, cert. den. 51 S. Ct. 657, 283 U. S. 867, 75 L. Ed. 1471.

In a prosecution of a War Department employee, evidence on an earlier occasion of a proposed bribe was held admissible to show intent.

United States v. Baneth (C. A. N. Y. 1946), 155 F. 2d 978.

It is submitted that the testimony of Earl J. Templeton in the instant case was properly admitted for the reason that it was a similar and related act that was admitted on the issue of intent.

VI.

The Trial Court Made Proper Comments and Properly
Instructed the Jury.

A. The Trial Court Properly Instructed the Jury When It
Read the Entire Bribery Statute.

Appellant in his brief (App. O. B. 42) concedes that defense counsel at the time of trial did not object to the court reading (old) 18 U. S. C. 207, but he now makes the claim that this was error, and such fundamental error as to be the basis for a reversal. A reading of the entire charge to the jury [Rep. Tr. 570 to 589, incl.] clearly shows that there was no fundamental error committed by the court in its instructions.

There is no analogy between this case and *Screws v. United States*, 1944, 325 U. S. 91, because in that case *the trial court had failed to instruct the jury on the essential elements of the only offense on which the conviction could rest*. The court very properly found this to be fundamental error. Such was not the instruction in the instant case.

Again, in the case from this Court of *Corson v. United States*, 1944, 147 F. 2d 437, the instruction of the trial court was improper because it failed to inform the jury what the applicable gasoline ration order allowed and what it forbade. This allowed the jury to assume that the law was violated and the offense committed merely on a showing of a suspicious transfer of coupons. It is clear from the instructions in the instant case that no such fatally deficient instructions were given. In the instant appeal the appellant is advancing the surprising suggestion that when the court reads in its entirety the statute on which the indictment is founded there is fundamental error committed.

Appellant is apparently confused when he states in his brief that, "The court erroneously instructed the jury on the statute that was not yet passed. The court read the jury the later statute instead" (App. O. B. 43). By referring to that portion of the instructions [Rep. Tr. 578] it is clear that the court explained the fact that there were two statutes, and then read the old section (old) 18 U. S. C. 207.

It is submitted that the court did not err in its instructions.

B. The Trial Court Followed Approved Federal Practice in Its Comments Upon the Evidence and Its Expression of Opinion on the Evidence.

Appellee agrees with the appellant that *Quercia v. United States*, 1932, 289 U. S. 466, fairly states the settled principles regarding fair comment by the trial judge. On page 469 the court says:

"In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination (citing cases)."

In the later case of *United States v. Murdock*, 1933, 290 U. S. 389, 394, the court applies the above stated principle as follows:

"In the circumstances we think the trial judge erred in stating the opinion that the respondent was

guilty beyond a reasonable doubt. A federal judge may *analyse the evidence, comment upon it, and express his views with regard to the testimony of witnesses* (emphasis added). He may advise the jury in respect to the facts, but the decision of issues of fact must be fairly left to the jury (citing cases)."

In the instant case it is readily apparent from reading the instructions as a whole that the decisions on issues of fact were fairly and clearly left to the jury.

The trial judge stated to the jury in the instant appeal that this was the first time in over ten years that he had been on the bench where he felt that comments should be made [Rep. Tr. 570]. The court immediately admonished the jury that they were not bound by the comments to be made and that it was their duty to decide the guilt or innocence of the defendant and to disregard the comments [Rep. Tr. 571, 577]. The court then continued by stating that the comments were made to help them arrive at a just verdict. Later in the instructions the court restated this and pointed out that there might be a tendency on the part of the jury to feel that there had been a racket and that the jury might punish the defendant for the racket, not the crime charged. The court then stated:

"You might resent what Mr. Cly did in this case but unless you believe he accepted a bribe it is your duty to find him not guilty" [Rep. Tr. 576].

It is submitted that none of the matters mentioned by appellant (App. O. B. 43-49, incl.) with regard to comments by the court violate the settled principles of fair comment set forth in the *Quercia* and *Murdock* cases.

C. The Trial Court Made a Proper Comment During the Trial.

Appellant asserts (App. O. B. 40, 41) that the trial court committed prejudicial error in a statement made during the course of the trial. This assertion is without foundation.

While the court did comment that when one is in government business it is known that such persons do not have to be paid to do their work, the court twice clearly admonished the jury that its comments were not binding upon the jury. Further, in its instructions to the jury the court again made it clear to the jury that the basic issue in the case was whether the money accepted by Cly was for service or was for a bribe, and that the jury was the final judge on this issue [Rep. Tr. 577]. The court instructed in part as follows:

“Let me say to you that the only question here is whether or not this defendant accepted bribes as set forth in the indictment” [Rep. Tr. 572]. “They say they were only supposed to be working while they were on the board, sitting on the board. Would I be justified in accepting money as an attorney and then pass upon the case before me and say that I was accepting the money as services and not as a bribe and be justified in doing it” [Rep. Tr. 574].

Appellant's reference to the Clerks of Courts and United States Marshal's office accepting fees does not assist him. The court can well take judicial notice of the fact that such fees paid to these governmental employees are paid into the Treasury and not into the pockets of the employees involved.

Conclusion.

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

WALTER S. BINNS,

Chief Asst. United States Attorney,

VINCENT N. ERICKSON,

Assistant United States Attorney.

Attorneys for Appellee.

Summati

Count No.	Date Alleged in Count	Property O
3	12/6/48	Mr. & Mrs. Cl
4	11/17/48	Mr. & Mrs. H
5	6/29/48	Don GRECO
7	11/20/48	Norman WESCO
8	9/ 4/48	Mrs. Mabel Pi
9	9/ 4/48	Mrs. Frances
11	7/15/48	Mr. & Mrs. F

¹Exhibits applicable to more t
Exhibit 11—Map
Exhibit 13)
“ 14)—Board N
“ 15)

Exhibit No. in Trial Court	Descr
1	\$50 check payable to dated 12/6/48 (sign
5	\$250 check payable to dated 11/15/48
6	Notification of rent i Area Rent Director,
7	Copy of Exhibit 6
8	Copy of Exhibit 6
9	Copy of Exhibit 6
11	Map of “Bay Area” sl No. 8, identified by when offered in evic
12	Reinspection letter sent of Don Greco, letter
13	Minutes of Advisory 12 refers to Don C and moved further i
14	Oath of Office signed
15	Minutes of Advisory B
15-A	Minutes of Advisory B 1948)
18	Area Rent Director's l he prepared this file
19	Area Rent Director's l prepared this file [54
20	Area Rent Director's F states he prepared th
21	Area Rent Director's l he prepared this file |
23	Area Rent Director's l prepared this file [54

¹Only those Exhibits regarding

APPENDIX B.

Data Regarding Exhibits.¹

tion of Exhibit	Marked for Ident. [Rep. Tr. pg. no.]	Admitted in Evid. [Rep. Tr. pg. no.]	Count to Which Exhibit Refers
Monte Cly given Cly by Chapman, and Elizabeth Chapman)	21	22	3
Cash given Hill by Esther Neiditch,	73	221	4
Increase sent to Mr. Wescoatt, by increase effective 11/23/48	134	137	7
	134	137	7
	134	137	7
	134	137	7
Following jurisdiction of Advisory Bd. Mr. Hill—no objection by def. ence	187	188	(all cts.)
by Area Rent Dir. to Hill re ppty dated 8/20/48	191	502	5
Bd. #8 for Aug. 13, 1948, Para. Greco; refers to 8/2/48 discussion increases be allowed	194	302	} RE MANY COUNTS
on 11/6/47 by Cly, minutes, etc.	238	302	
Board No. 8	298	300	
d. No. 8 (Jan., Feb., March, Oct.	—Mentioned in Rep. Tr. p. 569.		
File re Chapman case—Hill states [539]	537	569	3
File re Cohen case—Hill states he [43]	537	569	11
File re Preston & Barker cases, Hill his file [544]	537	569	8 & 9
File re Wescoatt case—Hill states [545]	537	569	7
File re Greco case—Hill states he [6]	545	569	5

g counts on which Cly was convicted are included above.

APPENDIX C.

Statutes Involved.

A. (Old) Title 18 U. S. C. § 207 reads as follows:

“§ 207. (*Criminal Code, section 117.*) *Official accepting bribe.* Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. (R. S. §§ 5501, 5502; Mar. 4, 1909, c. 321, § 117, 35 Stat. 1109.)”

B. (*New*) Title 18, U. S. C. § 202 reads as follows:

“§ 202. *Acceptance or solicitation by officer or other person.*

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in an official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.”

C. *Pertinent provisions of the Housing and Rent Statutes Involved.*

Only the portions of the Housing and Rent Law effective between November 6, 1947, and January 15, 1949, are set forth below. The reason for this is that appellant took his Oath of Office as a member of Rent Advisory Board No. 8 on November 6, 1947, and his resignation from that Board was made effective January 15, 1949. The Housing and Rent Law first in effect during this period was the Housing and Rent Act of 1947, Public

Law 129, effective July 1, 1947, Ch. 163, 61 Stat. 193. Certain provisions of the 1947 Act were amended in the Housing and Rent Act of 1948, effective April 1, 1948, Ch. 161, 62 Stat. 93.¹ The amendments made in the Housing and Rent Act of 1948 were generally an expansion and amplification of the provisions of the 1947 Act. Appellant in his Brief (A. Op. pp. 3-8, incl.) has apparently by oversight quoted the Act as it reads today and not as it read during the pertinent period, namely, November 6, 1947, through January 15, 1949.

While appellee agrees that the general sections covered in appellant's brief are the ones most pertinent to the case, we wish to correct the record so that the Court may have before it the provisions of the Housing and Rent Law actually in effect at the time appellant was on the Rent Advisory Board.

The portion of the Housing and Rent Act of 1947 quoted in the appellant's brief was apparently copied by mistake from the 1951 Cumulative Supplement to Title 50 App., Sec. 1894, thereof and more particularly to pages 704 and 705 of that Section. For the sake of clarity, the portion of the Housing and Rent Act of 1947 quoted in Appellant's Opening Brief will be set forth below, and *those portions not in effect during the period involved herein will be italicized*. The quotation which follows, except as otherwise noted, will be from the Housing and Rent Act of 1948, Ch. 161, 62 Stat. 93, beginning at page 95 thereof.

¹The Housing and Rent Act of 1948, Sec. 204(e), 62 Stat. 98, provided that said Act should be effective until the close of March 31, 1949.

“(c) The Housing Expediter is hereby authorized and directed to remove any or all maximum rents before this title [*this appendix*] ceases to be in effect, in any defense-rental-area or portion thereof or with respect to any class of housing accommodations in any such area or portion thereof, if in his judgment the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exist, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met. *The Housing Expediter is further authorized and directed to remove maximum rents from any or all luxury housing accommodations in any defense-rental area or portion thereof, if in his judgment such action would result in the creation of additional rental units by conversion.* The Housing Expediter shall from time to time make surveys with a view to carrying out the purpose of this subsection to de-control housing accommodations at the earliest practicable time.

“(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).¹

“(e) (1) The Housing Expediter is authorized and directed to create *and, if necessary continue in existence until the termination of this Act* in each defense-rental area *whether or not under Federal rent control* or such portion thereof as he may designate, a local advisory

¹This subsection (d) appears in the Housing and Rent Act of 1947, and it was not amended in the Housing and Rent Act of 1948.

board, *The Housing Expediter shall whenever in his judgment there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended [50: Appx. 25], prior to March 1, 1947, as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of such Act, in which maximum rents were not being regulated under such Act on March 1, 1947, each such board shall consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors: Provided, That in any case where the Governor has made no recommendations for original appointments to local boards or appointments to fill vacancies, within thirty days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948 [Mar. 30, 1948] from the Housing Expediter, the Housing Expediter shall without such recommendations appoint the original members of such boards or such members as may be required to fill vacancies. Nothing in the foregoing provisions shall require the reappointment of present members of local advisory boards, but any change in the membership of any local advisory board necessitated by this provision shall be effectuated as promptly as may be practicable. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on which the board shall make recommendations to the officials administering this title [this appendix] within its area; and before recommending any such adjustment the board shall*

give notice to the parties and shall hold a hearing at the request of either party. *Upon petition by a representative group of tenants or landlords, the board, if it finds that the petition is substantial in character, shall hold a public hearing in accordance with the requirements set forth in paragraph (4) of this subsection on any of the matters set forth in subparagraphs (A) and (B) of this paragraph. Such hearing shall be begun within thirty days after the filing of such petition, and shall be completed within thirty days after it is begun. Should the board for any reason fail to hold such hearing, the Housing Expediter, upon notice of that fact given by such group, shall (unless he finds that the petition is not substantial in character) hold a public hearing in like manner on such matters. Such hearing shall be begun within thirty days after the giving of such notice by such group, and shall be completed within thirty days after it is begun. If the Housing Expediter finds that such petition is not substantial in character, such group may file a complaint with the Emergency Court of Appeals within thirty days after the date such finding is made. Thereupon, if it finds that the Housing Expediter's finding is not in accordance with law, the Emergency Court of Appeals shall have jurisdiction to enter, within thirty days after the date of filing of such complaint, an order directing the Housing Expediter to hold such hearing. If a hearing is held by either the board or the Housing Expediter, a recommendation by the board or decision by the Housing Expediter, as the case may be, on the merits of the matter shall be*

rendered within thirty days from the date of completion of such hearing, and the local board forthwith shall forward its recommendation to the Housing Expediter.¹

Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

“(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

“(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title [*this appendix*]; and

¹This portion of appellant's quotation would seem to refer in general context to Secs. 204(e)(3) and 204(e)(4), found on pp. 96 and 97 of 62 Stats.

“(C) Operations generally of the local rent office with particular reference to hardship cases.

“(2) The Housing Expediter shall furnish the local boards suitable office space and stenographic assistance and *reporting services for public hearings (including attendance fees)* and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense-rental areas which may be requested by such boards.”

Section 204(e)(3) of the Housing and Rent Act of 1948, provides as follows:

“Upon receipt of any recommendation from a local board, the Housing Expediter shall promptly notify the local board, in writing, of the date of his receipt of such recommendation. Except as provided hereinafter in this subsection, within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect.”¹

¹This section 204(e)(3) of the Housing and Rent Act of 1948 has been added by appellee for the assistance of the Court.

No. 12,969

IN THE

United States Court of Appeals
For the Ninth Circuit

HARRY SIMMONDS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

CHARLES R. GARRY,

JULIUS M. KELLER,

68 Post Street, San Francisco 4, California,

Counsel for Appellant.

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Facts	3
Specification of errors	8

I.

The appellee did not show, either by pleading or proof, the necessity or authority to condemn appellant's fee.....	8
A. The pleadings	8
B. Proof and findings	11
C. The law	14

II.

The evidence was insufficient to support the jury's verdict as to value	20
A. The court erred in admitting evidence of the price appellant paid for the property	20
B. The evidence	21

III.

The court erred in finding that the property condemned consisted of 18.27 acres	33
Conclusion	35

Table of Authorities Cited

Cases	Pages
Curtis v. Boston, 247 Mass. 417, 142 N.E. 95.....	15
Madera Railway Co. v. Raymond Granite Co., 3 Cal. App. 668	17
Montebellow etc. School District v. Keay, 55 Cal. App. (2d) 839	18
People v. Broome, 120 Cal. App. 267.....	19
People v. Milton, 35 Cal. App. (2d) 549	16, 18
People v. Olsen, 109 Cal. App. 523	16
Seattle v. Faussett, 212 Pac. 1085	15
United States v. Meyer, 113 F. (2d) 387.....	16, 18
Young v. Gurdon, 169 Ark. 399, 275 S.W. 890.....	15

Statutes

Code of Civil Procedure, Section 1241	17
28 U.S.C., Section 1291 (Act of June 25, 1948, C. 646, Sec- tion 1, 62 Stats. 929)	1
33 U.S.C., Section 591	1, 9, 14, 15, 18
40 U.S.C., Section 257	1, 16
40 U.S.C., Section 258	14
40 U.S.C., Section 258a	16
Public Law 409 (49 Stats. Ch. 831, p. 1028) (commonly known as the Rivers and Harbors Act), adopted August 30, 1935, as revised by Public Law 526 (60 Stats. Ch. 596) adopted July 24, 1946	15, 18
Rivers and Harbors Act of 1935, Section 7	17

Texts	Page
18 Am. Jur. 741	14
18 Am. Jur. 994	20
10 Cal. Jur. 407	17
68 A.L.R. 837	14
79 A.L.R. 516	14
10 R.C.L., page 88	14

No. 12,969

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HARRY SIMMONDS,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the District Court of the United States, for the Northern District of California, Northern Division, condemning and fixing the value of certain property in the County of Yolo, State of California.

Jurisdiction in the District Court was claimed under Section 591, Title 33, U.S.C., and Section 257, Title 40, U. S. Code.

Jurisdiction of this Court is conferred by Title 28, U.S.C., Section 1291 (Act of June 25, 1948, C. 646, Section 1, 62 Stats. 929).

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division, Honorable Dal Lemmon presiding, entered after verdict of a jury, and after judgment by the Court on certain matters submitted to it for its decision. (See Tr. of Rec. p. 96, Notice of Appeal.)

The action was commenced by the United States Government to condemn certain lands in Yolo County, California, property of the appellant herein. The issues joined for trial were:

1. The necessity or right of the Government to condemn the fee to the real property in question;
2. The number of acres of land owned by the appellant; and
3. The value of the property.

The only issue submitted to the jury was the value of the property, *per acre* (see Rep. Tr. p. 417), the Court reserving to itself the questions as to the number of acres belonging to appellant and the necessity and right of the Government to condemn the property.

The jury found the value of the property, as of the date of taking, which date was stipulated to be between counsel (Tr. of Rec. p. 69) to be \$375.00 per acre. The Court, on November 22, 1950, found that

the property condemned consists of 18.27 acres, and "against (appellant) upon other issues submitted * * * for decision." (Tr. of Rec. p. 70.) Thereafter, and on the 14th day of December, 1950, judgment, containing findings of fact and conclusions of law, was lodged by the Court. (See Tr. of Rec. p. 74.) Appellant, on the 22nd day of December, 1950, filed his motion for a new trial, which motion after hearing by the Court, was denied. (Tr. of Rec. pp. 91, 94.)

FACTS.

Appellant purchased the real property in question on October 21, 1944. (Rep. Tr. p. 64.)

Shortly thereafter, and in early 1945, the Government of the United States, prior to the institution of any condemnation proceedings, entered upon the lands and commenced cutting down some 12,000 trees and dumping sand and silt from the Sacramento River, which river flows adjacent to the property in question. (See Rep. Tr. p. 59.)

On August 5, 1947, some two years after the initial trespass, the Government of the United States commenced the present proceeding by filing a complaint in condemnation, seeking to condemn this land and certain other lands adjacent thereto. (The property herein involved was designated at that time as Tract No. 7.) *The Government in its original complaint sought only a right or easement for a period of fifteen*

years for the purpose of depositing thereon spoil and other material excavated in the improvement and maintenance of the Sacramento River.

It should be noted that in the same complaint, the Government (appellee herein) sought an easement or right on land adjacent to that of the appellant for a period of *five years only*. That tract, designated as Tract No. 8 in the same complaint, lies immediately north of that belonging to appellant and is described as consisting of 14.388 acres, more or less, or roughly the same acreage as that alleged to belong to appellant herein. (See Tr. of Rec. p. 2.)

The complaint alleged, upon information and belief, that the lands taken were not part of a larger tract belonging to the purported owners, and described appellant's property as consisting of 16.92 acres, more or less.

At the time of the filing of the original complaint in condemnation, to wit, on or about August 11, 1947, no declaration of taking was filed, nor any judgment of the Court on the declaration of taking was sought; nor was any estimate of just compensation made by the appellee; nor any deposit of money made with the registry of the Court. None of these things were done until approximately one year later, to wit, on or about the 12th day of August, 1948. (Tr. of Rec. pp. 29-36.)

Thereafter and on *January 16, 1948*, prior to any pleading by appellant, appellee filed an amendment

to complaint, seeking a right of easement on appellant's property, *retroactive to June 15, 1943*, thus antedating the original trespass. (See Tr. of Rec. p. 10.)

On March 1, 1948, appellant filed his answer to appellee's amended complaint. (Tr. of Rec. pp. 13 et seq.)

On August 11, 1948, appellee filed its second amendment to complaint, changing the description of the property and alleging that the said property consisted of only 13.308 acres, more or less. (Tr. of Rec. p. 24.)

On or about August 12, 1948, appellee filed a "Declaration of Taking," signed by the Secretary of the Army, setting forth the public use to which the lands sought to be condemned were to be put, and an estimate of just compensation for the value of the purported fifteen-year easement for Tract No. 7. The Court, upon *ex parte* application of appellee, entered its judgment, vesting in appellee a right and easement for fifteen years, commencing June 15, 1943, deeming the land taken by appellee as necessary and suited to the use, and that just compensation for the taking to be ascertained and awarded by judgment. (Tr. of Rec. p. 33.)

Thereafter, and on October 20, 1948, appellee Government filed notice of motion for leave to file its third amendment to complaint, proposing to amend its complaint to allege condemnation of the land in fee simple. (Tr. of Rec. p. 37.)

On October 29, 1948, appellant filed written objections to the filing of the proposed third amendment to complaint, basing his objections on the ground that appellee's proposed amendment to complaint did not show the necessity for the taking of appellant's property in *fee simple*. (Tr. of Rec. p. 43.)

The Court made its order allowing the third amended complaint to be filed, and pursuant thereto, on the 17th day of December, 1948, appellee filed an amendment to the declaration of taking. Thereafter and on the 22nd day of January, the District Court entered an amendment to the judgment on declaration of taking. (See Tr. of Rec. p. 49.)

On March 9, 1949, appellant filed his answer to appellee's third amendment to complaint, alleging, *inter alia*, that it was unnecessary for appellee to condemn the fee simple to appellant's property for the use and purposes alleged by appellee, and that the taking of the fee was therefore in violation of the Fifth Amendment to the Constitution. (Tr. of Rec. p. 49.)

On or about April 25, 1950, appellee filed its fourth amendment to complaint, alleging the taking of additional property belonging to the appellant, designated therein as Tract No. 7, Parcel 2 (Tr. of Rec. p. 56), and thereafter filed Declaration No. 2 (Tr. of Rec. p. 61), setting forth the estimated just compensation for the additional tract.

On or about September 22, 1950, appellant filed his answer to the fourth amendment to complaint, alleg-

ing, *inter alia*, that it is unnecessary for appellee to condemn the fee of appellant's land for the purposes set forth in appellee's complaint, and that the taking of the fee thereof constituted a denial of due process of law. (Tr. of Rec. p. 64.)

Prior to trial, a stipulation was entered into between the parties, stipulating that the fair market value of the property shall be determined as of November 8, 1948, and that the property shall be valued in its physical condition as it existed on October 21, 1944 (Tr. of Rec. p. 67), prior to the date of the trespass of the Government.

The property herein involved is a tract of land lying directly across the Sacramento River from the Capitol of the State of California, within a mile of the State Capitol Buildings, and one-quarter mile from a bridge known as the I Street Bridge, which bridge extends from the center of the population of the City of Sacramento. (See Defendant's Exhibits A, B and C.) The Court found that the property consisted of 18.27 acres (see Tr. of Rec. p. 70), although the appellant claimed that it consisted of an additional 3.6 acres. (See Rep. Tr. pp. 3, 52.) Except for a small house built thereon, the land is unimproved property. However, its physical condition as it existed in 1944 (stipulated to as the date the jury should consider its physical condition), the property had the appearance of a natural park, consisting of large wooded areas containing large trees. (Rep. Tr. p. 31.) Appellant testified that approximately 20,000 trees were cut down by appellee government after he

had purchased the property. (Rep. Tr. pp. 57-58.) The property was easily accessible by means of a county road that ran along the entire western boundary of the property. (Rep. Tr. p. 16.)

SPECIFICATION OF ERRORS.

1. The Court erred in finding that it was necessary for appellee to condemn the fee to the property involved.

2. The evidence does not support the jury's verdict as to the value of the property.

3. The evidence does not support the Court's finding that the property consisted of 18.27 acres.

I.

THE APPELLEE DID NOT SHOW, EITHER BY PLEADING OR PROOF, THE NECESSITY OR AUTHORITY TO CONDEMN APPELLANT'S FEE.

It is submitted that the Court erred in allowing appellee to condemn appellant's fee in this matter, since appellee did not allege, nor prove, the necessity or authority, to take the fee.

A. The pleadings.

1. This action was commenced by a complaint (see Tr. of Rec. pp. 1-8) in condemnation, filed August 5, 1947. The complaint alleged (paragraph VII) that the land described "has been selected * * * for use in

connection with the improvement of the channel of the Sacramento River, California, and is sought to be taken and condemned for said purpose and use and is suitable and necessary therefor;" and (paragraph III) that the acquisition of the said lands by plaintiff will be of the greatest public benefit and least private injury; and (paragraph II) that the estate or interest sought is "*the right and easement for a period of fifteen years, to deposit on the land * * * any and all spoil and other matter excavated in the improvement and maintenance of the Sacramento River Improvement Project * * **"

The complaint cited as authority for the taking Section 591, Title 33, U. S. Code, and the Rivers and Harbors Act of 1935, as amended by Act of July 24, 1946. (49 Stats. Ch. 831 and 60 Stats. Ch. 596.)

2. Thereafter appellee filed a declaration of taking (Tr. of Rec. pp. 29-31) signed by Kenneth C. Royall, Secretary of the Army, dated May 19, 1948, which declaration averred, *inter alia* "(b) The public use for which said lands are taken are as follows: 'That said lands are necessary for the deposit of spoil for the Sacramento Improvement and Navigation Project * * *' and '3. The Estate taken for such public use is the right and easement to deposit on said lands * * * any and all spoils and other matters excavated * * * for a period of 15 years commencing June 15, 1943.' "

(Our emphasis.)

3. Pursuant to said declaration and on August 12, 1948 (Tr. of Rec. pp. 33-36) and upon *ex parte* appli-

cation, the Court entered judgment for appellee, *granting to the United States Government an easement for a period of fifteen years commencing June 15, 1943, for the sole purpose of dumping spoil and other matter excavated from the Sacramento River, and finding "that the said lands are deemed to have been taken and condemned for the public use * * * as authorized by law and are necessary and suited to said use."*

4. Thereafter, and on October 20, 1948, appellee served appellant with a notice of motion for leave to file its third amendment to complaint (Tr. of Rec. p. 37), and attached thereto its proposed amendment (Tr. of Rec. p. 38), which amendment to complaint sought to amend *only* paragraph II of its original complaint, and to condemn the *fee* to appellant's property.

It should be noted here that no new facts were alleged showing the necessity or the authority to take the fee; nor were any amendments to the complaint proposed to change the allegations of Paragraph III (alleging the public interest and least private injury) or Paragraph VII (alleging the suitability of the land for the purposes and use and its necessity).

5. Appellant on October 29, 1948 (Tr. of Rec. p. 43) filed his objections to the allowance of the amendment, on the ground that appellee did not show the necessity of taking appellant's fee for the purposes alleged in the complaint, to wit, the dumping of spoil from the Sacramento River.

6. Notwithstanding appellant's objection, the Court made its order allowing the amendment to the complaint to be filed, and on November 8, 1948 appellee duly filed its amendment. (Tr. of Rec. p. 44.)

7. Pursuant to the filing of the amendment to complaint and order of Court dated January 22, 1949 (Tr. of Rec. p. 46) appellee filed an amendment to declaration of taking, which amendment merely increased the sum of money to be deposited for the taking but *did not set forth any additional reasons for the increased estate, nor show the necessity or authority for the taking of the fee in place of the easement previously taken.*

8. The Court, on *ex parte* motion, and on the 22nd day of January, 1949, entered an amended judgment of declaration of taking, changing the sum deposited with the registry of the Court.

9. Thereafter and on March 9, 1949, appellant filed his answer to the amendment to the complaint, alleging, *inter alia* (see Tr. of Rec. p. 50) that it is unnecessary for appellee to condemn appellant's fee for the purposes and use for which the property was sought to be condemned.

B. Proof and findings.

It is submitted that no evidence was adduced by appellee to show that more than an easement was necessary for the purposes and use to which appellee allegedly sought to condemn the property; nor was any evidence introduced showing that the condemning au-

thority ever made a determination of the necessity thereof.

1. At trial, commencing October 24, 1950, a conference in the Court's chambers was held to determine the procedure of trial, where it was determined that the only question to be given to the jury for its verdict was the value of the property, the Court reserving to itself the other questions raised by the pleadings, to wit (1) the amount and extent of the land owned by the appellant, and (2) the necessity for appellee to condemn the fee title to appellant's property for the purposes set forth in the complaint and amendments thereto. (See judgment as to Tract 7 and to Tract 7, parcel 2, Tr. of Rec. pp. 74-83, particularly p. 75, lines 17-23.)

2. The only evidence, as shown by the record, adduced by either party was contained in several exhibits, particularly plaintiff's exhibits 12, 13, 14, and 15, which were admitted without appellant's objection.

Exhibits 13 and 15 deal with the subject of the increase in the estate from an easement to that of the taking of the fee.

Exhibit 15 is the only evidence showing the authority of the Attorney General to amend its complaint to take the fee. A careful examination of that exhibit will conclusively *demonstrate that no finding is made by the Secretary of War as to the necessity of having the fee*. No change of circumstance is shown why the

fifteen-year easement would not satisfy the Government's needs, *or that the same is necessary for the public use.* The letter merely states: "*It has been determined to be advisable to change the estate taken * * * from easements to the fee title.*" (Our emphasis.)

But *why?* Is private property to be taken merely because some administrative officer believed it "advisable" that it be taken?

3. The Court in its findings (Finding No. VI, Tr. of Rec. p. 80) finds:

"That it was and is necessary for the plaintiff to condemn the fee title of the defendant Harry Simmonds' property subject to this Final Judgment for the purposes set forth in the plaintiff's complaint and amendments thereto."

If it was deemed necessary by the Court and appellee to make a finding that it was necessary for appellee to have the fee title for the purpose of dumping spoil from the Sacramento River on appellant's land, then it was incumbent for appellee to plead and prove this necessity—a finding must have some evidence to support it. Here, there is *no* evidence of necessity—only a statement to the effect that "it is deemed advisable" to take the fee. *But one may not equate advisability with necessity.*

It is therefore submitted that no evidence of need for the fee is shown, and the finding of the Court as to such necessity is without evidentiary support.

C. The law.

1. The practice, pleadings and forms and modes of procedure of the Courts of the State in which the real property is situated applies in condemnation proceedings instituted in Federal District Courts.

Title 40 *U. S. Code*, Section 258;

Title 33, *U. S. Code*, Section 591.

2. It is submitted that the law is clear that the Government may not condemn more property nor a greater estate therein than is needed for the purposes and use for which it seeks to condemn private property.

a. A comprehensive statement of the rule is found in 10 R.C.L. at page 88, where the text writer states:

“Inasmuch as property cannot be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which shall be required to pay for more than it needs.”

Also cited in 79 A.L.R. 516, 68 A.L.R. 837, and 18 Am. Jur. 741.

b. It has been held time and time again that no more property of a private individual, nor greater

interest therein, can be condemned and set apart for public use than is absolutely necessary.

Young v. Gurdon, 169 Ark. 399, 275 S.W. 890;

Curtis v. Boston, 247 Mass. 417, 142 N.E. 95;

Seattle v. Faussett, 212 Pac. 1085.

3. The appellee should have alleged and proved the necessity and right to take appellant's fee simple title.

a. There is nothing in the statutes under which appellee proceeded that gave it the authority to take the fee, when the easement would suffice.

Appellee in his complaint relied upon the following statutes for its authority to proceed at all:

Public Law 409 (49 Stats. Ch. 831, p. 1028)

(commonly known as the Rivers and Harbors Act), adopted August 30, 1935, as revised by Public Law 526 (60 Stats. Ch. 596) adopted July 24, 1946.

An examination of these statutes reveal that they are general statutes, authorizing improvements to many rivers and harbors, including the Sacramento River.

Title 33, Section 591, U. S. Code, is a general statute providing that the Secretary of War may institute proceedings for the acquisition of any "land, right of way, or material needed" in the improvement of rivers and harbors.

Appellee also cites Section 257 and 258a of Title 40, but neither of these sections adds anything to the authority of the Secretary of War.

It can reasonably be concluded that the Attorney General had the power to proceed to condemn appellant's land *after a determination* of the Secretary of War that the same was necessary to accomplish the purposes and use to which it was to be put.

In discussing these Acts, the Court (C.C.A., 7th Cir.) in *United States v. Meyer*, 113 F. (2d) 387, specifically held that the Secretary of War is authorized to acquire the fee simple title *when deemed necessary*.

Appellant is not unmindful of the holding that "the power to decide whether such a title is needed is, by the legislation, conferred upon the Secretary, and in the absence of bad faith or abuse of discretion, such determination is not subject to judicial review." (*U.S. v. Meyer, supra*, and cases therein cited.)

See also:

People v. Olsen, 109 Cal. App. 523;

People v. Milton, 35 Cal. App. (2d) 549.

But, the point in this case is that no such determination had been made by the Secretary of War. At least, neither the pleadings nor the evidence show that the Secretary of War deemed it necessary that the fee be taken for the purposes for which the property was condemned.

It is obvious that *an easement* is sufficient for the purposes and use for which the land was sought to be

condemned. The stated purpose is to dump spoils from the Sacramento River. When the land is completely filled in, then what is the Government to do with the property? Under the provisions of the Rivers and Harbors Act of 1935 (Section 7), the Secretary of War is authorized to sell land no longer needed or serviceable. Is it the thought of the Government that the property will be condemned, filled with the spoil, and then sold to private persons?

The fact that originally the Government sought *only* an easement is proof that that would suffice for its needs. To amend its complaint and seek the fee, merely because "it is deemed advisable" is *not* a showing of need, necessity, or that the public interest will best be served. Certainly, an easement was deemed sufficient for all of the neighboring properties.

4. The *burden of proof* as to necessity is upon the condemnor to show that the use to which he seeks to appropriate land is a public one.

California Code of Civil Procedure, Section 1241;

10 *Cal. Jur.* 407;

Madera Railway Co. v. Raymond Granite Co.,
3 *Cal. App.* 668.

The condemnor must plead the right of the plaintiff to take the property and the purpose of the taking. (Calif. C.C.P., Sec. 1244.) Where there is pleading or evidence that the Legislature or the authority to which it has delegated the power, has actually determined the necessity and public use, the burden of

showing fraud, or abuse of discretion, is on the condemnee.

Thus, in *United States v. Meyer*, supra, the Secretary of War had made a determination that the fee was necessary for the improvement of the Mississippi River, under the authority of the Rivers and Harbors Act of 1935 and 33 U. S. Code, paragraph 591 (the same acts under discussion herein), and the Court holds that such determination is final in the absence of bad faith or abuse of discretion.

In the case at bar there was no determination by the Secretary of Army that anything but an easement was necessary.

In *People v. Milton* (35 Cal. App. (2d) 549), the pleadings and exhibits offered at trial made out a *prima facie* case of the right of eminent domain by showing a resolution of the Department of Public Works declaring that the public interest and necessity required the taking of the property, and the Court holds that the issue of excessive taking is one for judicial determination, but that the issue must be properly raised by pleadings, and the condemnee must show bad faith or abuse of discretion.

In *Montebellow etc. School District v. Keay* (55 Cal. App. (2d) 839), the condemnor School District had made a finding of the need for a particular site. The Court again held such finding conclusive and that the burden of proof, after the question is properly raised by pleading, to show the contrary is on the condemnee.

See, also,

People v. Broome, 120 Cal. App. 267.

The thread running through all these cases is that the condemning authority, e.g., the Secretary of War, Department of Public Works, or the School District, had made a finding or determination as to the public interest or necessity of acquiring the property sought to be condemned, or the estate therein, by proper pleading and proof, a *prima facie* case of necessity and public interest had been made.

In the instant case, *no such determination is shown*. The pleadings show the necessity *only* for a fifteen-year easement. The evidence shows only that "it is deemed advisable." The appellant had by proper pleading *denied* the public interest and necessity.

In such circumstances, the burden of proof was on the condemnor to make out at least a *prima facie* case of public interest and necessity to be served by taking the fee rather than the easement before the condemnee should be forced to come forward with evidence to show bad faith or abuse of discretion. Appellant could not present such evidence unless and until the appellee had shown the *use of the discretion* vested in it by Congress, *rather than the absence thereof*.

The appellee having failed to show, either by pleading or proof, the public interest or the necessity of taking the fee rather than the easement, it is submitted that the judgment must be reversed and the matter remanded for a new trial.

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE
JURY'S VERDICT AS TO VALUE.

A. The Court erred in admitting evidence of the price appellant paid for the property.

1. The general rule is that it is competent, as evidence of market value to show the price at which property was bought, if *not* so remote in time as to have no bearing on the question of present value.

18 *Am. Jur.* 994.

2. The evidence herein was that the appellant purchased the property in 1944, and the date of valuation was 1948. In view of the change in market conditions between the years 1944 and 1948, it is submitted that appellant's objection to the question as to the purchase price in 1944 should have been sustained. (Rep. Tr. p. 64.) See, also, testimony of expert witness for appellant, Hulting, stating that the purchase price was too remote and the value was greater in 1948 than at the time of the purchase in 1944.

(Rep. Tr. pp. 201-202.)

3. While standing alone, the erroneous admission of this evidence may not be considered reversible error. Yet, as will presently appear, it became reversible and prejudicial because of the fact that the Government witnesses relied upon this fact as a primary basis for their opinions as to market value in 1948.

B. The evidence.

1. It is the contention of the appellant herein that no credible evidence of value was presented by appellee and that therefore the jury's verdict of value, to wit, \$375 per acre, was not supported by the evidence.

The appellee produced two experts, the first of whom was Chris R. Jones, who was totally discredited by the appellant on cross-examination.

(a) Chris R. Jones is a real estate appraiser of many years' standing, member of the National Real Estate Board, California Real Estate Association, Sacramento Real Estate Board, and the American Institute of Real Estate Appraisers. At the time of trial, he was a California State Inheritance Tax Appraiser and had been such for over fifteen years. He had been active in the appraisement of real property for over twenty-five years, having been engaged by city, State, or various branches of the Federal Government including the Department of Justice, Army, and Housing. (Rep. Tr. pp. 221-223.) His qualifications as an appraiser were not questioned by appellant. His appraisal in this case, however, is questioned, as more fully appears herein.

On direct examination, after a considerable amount of testimony as to what the expert took into consideration in fixing the value, he testified as follows:

“Q. (by Mr. Dill). * * * did you arrive at an opinion as to what was the fair market value

* * * as of November 8, 1948, taking into consideration its physical condition in October of 1944?

A. I did.

Q. And what was that?

A. Sixty-five hundred dollars.

Q. Do you know how much that is an acre, on an acreage basis.

A. Approximately *three hundred dollars* an acre, allowing a thousand dollars for the little house."

(Rep. Tr. pp. 233-234.) (Our emphasis.)

But on cross-examination:

"Q. (by Mr. Garry). When did you go on the property the first time?

A. * * * I think it was the latter part of 1945."

(Rep. Tr. p. 246.)

"Q. Did you evaluate the property at that time?

A. Yes I did."

(Rep. Tr. p. 247.)

* * * * *

"A. I valued it at \$4,500."

(Rep. Tr. p. 249.)

* * * * *

"A. That is for the purpose of fill.

Q. In other words, you evaluated this entire area at \$4,500, just for the purpose of fill?

A. That is right, and Mr. Simmonds was to retain the fee.

* * * * *

Q. Now at that time, how many acres were you told were on this property?

A. Eighteen point two two * * *.

* * * * *

Q. Is not it a fact, Mr. Jones, that at that time you were told by the United States Government that the property was only thirteen—thirteen point acres?

A. Yes, that is right. * * *

Q. Then the evaluation that you placed on the property in 1945 was on the basis of thirteen acres and it was also on the basis of just use for fifteen years and not taking the fee, is that correct?

A. That is right.”

(Rep. Tr. p. 250.)

* * * * *

“Q. How did you arrive at that figure at that time?”

(Rep. Tr. p. 250.)

“A. I arrived at it in this way. *I knew what Mr. Simmonds had paid for the property.* I knew of the tremendous increase in value that arose out of the property being filled—other property being filled, and I knew that he would be deprived the use of it for fifteen years, but at the end of fifteen years he would have a fill there which if he had had to do at the time himself would cost several hundred thousand dollars, so it was my judgment that in view of the fact they were taking the property away from him for fifteen years, he is to be given what he paid for it. I think I was liberal, but I figured he should be given what he paid for it so at the end of fifteen years, he

would have a very valuable piece of property. That was my line of reasoning. (Our emphasis.)

“Q. In other words, you figured that the use of this property for a period of fifteen years was worth better than \$350 per acre.

A. Well, whatever it figured out to.”

(Rep Tr. p. 251.)

* * * * *

“Q. How do you account for evaluating this property at sixty-five hundred dollars when you had already evaluated just the easement for forty-five hundred dollars based on thirteen acres? How do you account for that?

* * * * *

A. Well, I attempted to explain to you before the taking of the property for fifteen years and filling it, deprived the owner certainly of the use of the property for fifteen years, but for that use he was getting substantially some benefit. Now, if you take the property as it is and just take the property-physical condition that it is and take the fee to it for the reasons I have discussed heretofore, I think that the reasonable market value of it is sixty-five hundred dollars.

Q. It is your testimony then, Mr. Jones, that when the government is taking the fee, taking everything away from this particular defendant, Mr. Simmonds, where he doesn't get the property back at all, that you figure that the property is worthy sixty-five hundred dollars for eighteen point two seven acres, but when the government only takes it for fifteen years and in addition piles sand on there, which in your opinion, improves the property, for thirteen point three oh

eight acres, that that property is worth forty-five hundred dollars?

A. That is right."

(Rep. Tr. pp. 258-259.)

What are we to conclude from the evidence of this witness? He testifies that for thirteen acres, the use of the property for a fifteen-year period is worth about \$4,500, or approximately \$345 per acre. The reason for this valuation (Rep. Tr. p. 232) is that at the end of fifteen years, appellant would receive back a very valuable piece of property that would have cost him two hundred thousand dollars to fill. (See Rep. Tr. p. 269.) In other words, the witness is saying that if the Government takes only a fifteen-year easement, the appellant should be paid \$204,500; i.e., \$4,500 for the use of thirteen acres of property, together with fill valued at \$200,000. (500,000 cubic yards at forty cents per cubic yard. See Rep. Tr. p. 269.)

(b) The other expert produced by appellee was William M. Thielbar. At the time he made the appraisal of the property herein, he was employed by the United States Corps of Army Engineers (Rep. Tr. p. 296) as an appraiser. Subsequently, he was employed as an appraiser by the Hancock Insurance Company.

It is contended herein that Mr. Thielbar made no independent appraisal but relied only on the contract of sale by which appellant acquired the property and on appraisements made by others. Thus:

"Q. Yes, in August of 1948?

A. That is true.

Q. Because you had just gone to work there in July of 1948?

A. That's right; that's right.

Q. And yet you proceeded to agree with the \$4500 appraisalment, without any consideration of any of the other properties, the ones we are discussing now, did you not?

A. On the basis of the foundation of comparable sales, yes, I did.

Q. You did examine some comparable sales before you arrived at the fact that the \$4500 was a fair value of this property?

A. Yes.

Q. On August of 1948?

A. That's right.

Q. When did you do it?

A. When I read the contract between Mr. Simmonds and Mr. Hoagland.

Q. Oh, you——

A. What better comparable sale is there?"
(Rep. Tr. p. 267 [see also Rep. Tr. p. 306].)

"Q. Oh, that is the only basis that you used, is that correct?

A. Not entirely.

Q. What other basis did you use, Mr. Thielbar?

A. I used my own mind and opinion."
(Rep. Tr. p. 368.)

Without setting forth at length all of Mr. Thielbar's testimony, an examination shows that in making this evaluation, he relied only on *that sale* and information he found in the file of his predecessor, a Government employee. We believe it a fair statement of the record to conclude that in fact Mr. Thiel-

bar made no independent appraisalment but was merely repeating on the witness stand appraisements made by others, and sought only to corroborate the discredited Mr. Jones.

2. Appellant produced two expert witnesses.

(a) The first was Kenneth B. King, who testified that he had had twelve years' experience in real estate transactions in the Sacramento area, and was an appraiser for the California Highway Commission. (Rep. Tr. pp. 129-130.)

He valued the property at \$3,500 per acre (Rep. Tr. p. 131), without taking into consideration the value of the soil. (Rep. Tr. p. 132.) For the basis of his reasoning, he gave the following testimony:

"A. Well, to go back to make a study of it, the property has at least a 1,000 foot frontage on the river, probably the only property where you have access to the river. There is nothing along the river where you can get that amount of land as close to the town as that. There are locations along there which I have talked to different companies who have them for sale, so that is why I have arrived at that figure. As you go by the Tower Bridge or the M Street Bridge, as you call it, you will notice to the right of it the West Sacramento Land Company and Eugene Williams have it for sale * * *"

(Rep. Tr. p. 132.)

"A. This property, absolutely, when you deal with a corporation or you deal with a private enterprise, they want to get as close to town as they can possibly get and they will pay the price if they can get it, especially when you can get

river frontage. They want that. You can buy land out in here or land out in there without river frontage for practically—well, dirt cheap, but when you come up to buy close to the river, it is valuable (indicating). When you have access to the river, that means something. There isn't a place along the road that I can tell you where you can get permission from the reclamation board or the engineers—you can't have a plant close to a turn in the river, they won't allow it because they are afraid that it will either be hit by a barge or something will break loose, so you have to get in a section where you are free from that, such as where the Shell Oil is * * *

(Rep. Tr. p. 134.)

“A. You can make it any depth you want. The frontage is what they are after. That is 208 feet.

You take the Ballard property, it was sold in 1948 and 1947, it is on the river frontage. In 1946 a portion of that was sold, it was fifty feet for \$5,000.00. In 1947 one hundred feet more was sold for \$10,000.00, which makes \$15,000 for 150 feet.

If you value 150 feet which is improved property by the acre at 71/100ths of an acre, and you take the acreage in it, it would be \$20,000—it would be around \$26,000 an acre. Anyway, that is just about what the figure is.

* * *

(Rep. Tr. p. 135.)

“Q. In other words, Mr. King, your analysis and evaluation of this property is based on the fact that it is on a comparatively straight line of river?

A. That is right.

Q. Without any curves or without any impediment?

A. That is right.

Q. So it can be used for an industrial site, is that right?

A. Yes. I talked to the Reclamation Board and I talked to Mr. Mellin, and Mr. Mellin told me that all I had to do was bring an application to the Board and that the Reclamation Board has full authority clear to the water's edge and from then on, if there is any building going on it is up to the U. S. Army Engineers."

(Rep. Tr. p. 137.)

(b) The other expert was Burt Hulting, who testified that he was by profession a real estate broker, salesman, loan broker and real estate appraiser. He was a member of the San Francisco Real Estate Board, First Vice President of the California Real Estate Association, member of the American Institute of Real Estate Appraisers, past president and member of the Governing Council of the American Right-of-Way Association, and member of the Society of Residential Appraisers. (Rep. Tr. pp. 181-182.)

He testified that he had been an appraiser for twenty-one years, had done appraisals for the State of California and the Federal Government in condemnation proceedings, and had made appraisals and appeared in Court for the same counsel who were handling the case for the Government in this proceeding. (Rep. Tr. p. 182.)

As to value he testified as follows:

“A. My opinion of the value of the land is eighteen hundred dollars per acre, and as far as the house that was in existence there, my opinion of its present worth as of November of 1948 is two thousand dollars.

Q. Two thousand dollars?

A. Yes.

Q. Now, what is the basis for the value that you have appraised the property at eighteen hundred dollars an acre?

A. Well, first of all, I took into consideration the property itself. I made a rather thorough investigation of it sometime ago, going over practically all parts of it. I found that part of it came along the levee, along the levee side north of James Street, and there was a low spot immediately by the levee and a higher spot toward the river, somewhat as depicted by that relief map. I took into consideration its topography and what was on it at that time.

Q. Anything else?

A. And I took into consideration its location. It is located on the river almost across from the City of Sacramento. I took into consideration its location from the standpoint of its being accessible to Sacramento and its proximity to the City of Sacramento and all of the development that is taking place on the Yolo County side of the River, and I took into consideration its surroundings, the City of Sacramento and the immediate surroundings, the filling that's being going on up above, the commercial enterprise there, the Showboat Cafe that is up river from the property and the

development of the river down the river between the bridges and so forth and beyond, and the general surroundings of the property.

The development down between the two bridges, the development there for the use of boats and yacht harbors and so forth, I took into consideration.

Q. When you speak of the development between the two bridges, you are talking about the M Street Bridge and the I Street Bridge?

A. Yes. I took into consideration the possibilities of flood—this property lying outside the levee, I took into consideration the possibility of flood, considered the fact that the flood control on the river has been pretty well in hand for a great many years due to the Yolo Basin and so forth.

I took into consideration the highest and best use to which I thought the property could be put and it seemed to me in my experience that there were a number of uses that property could be put to. It could be developed along the levee in a residential way, apartment or motel or so forth. It could be developed with possibilities for boat, yacht harbor, or fishing or something of that nature.

In its location it is a type of property that in my experience, I have seen pretty large incomes developed from—even probable recreational center, a dance hall of the type and appearance that people of low income or even drive-in theaters. I mean, there are a number of uses, and then on top of that, it wouldn't take a great deal of expenditure to probably develop it for industrial

use of some type, oil company's bulk plant, or something of that nature.

So, the highest and best use in my opinion was commercial. It could be developed in several ways along that line. So I took that into consideration in arriving at my opinion of value.

Now, I took into consideration the sales of some properties that are somewhat similar, nearly similar, in the general area. Some of these properties were superior properties, but here was a basis for comparison. There was one property there between the two bridges occupied by the Sacramento Yacht and Boat Company, so-called Ballard property, which was a smaller property, which was a little more than an acre, which was sold for some fifteen thousand dollars an acre."

(Rep. Tr. pp. 184-186.)

(3) Appellants are cognizant of the rule of law that the jury is not bound by the testimony of experts but may form their independent judgment as to the market value of the property in a condemnation proceeding. Yet, since the jury found the value to be \$375 per acre, which sum approximately coincides with that of the Government witness, it is indicative of the fact that the jury used the same fallacious bases for their valuation as that used by the Government witnesses, in that the purchase price in 1944 became in 1948 the yardstick for valuation.

The Government witness, Jones, concedes that the 1944 purchase price has but remote bearing on the value of the property in 1948 when he evaluates the initial fifteen-year easement on 13.2 acres at \$4,500,

plus the addition of \$200,000 worth of free sand, which naturally would greatly increase the value of the property, which would then revert to the appellant.

After a careful reading of the entire record, we are convinced that the jury would not have fixed as low a price as \$375 per acre were it not for the admission of evidence as to the purchase price of \$4,500 in 1944.

Mr. Hulting, with all of his years of experience, frequently as a witness in many trials on behalf of the United States Government and admittedly "very conservative" (Rep. Tr. p. 191), valued the property at \$1,800 per acre. It is obvious that the remote purchase evidence was prejudicial to the cause of appellant herein.

We are not unmindful of the rule that a reviewing Court will not weigh the evidence and will not disturb the verdict of the jury when there is substantial evidence to support it. However, we submit that in view of the above, the jury's verdict is without evidentiary support.

III.

THE COURT ERRED IN FINDING THAT THE PROPERTY CONDEMNED CONSISTED OF 18.27 ACRES.

A. It was stipulated at trial that there was 18.27 acres of land owned by appellant which lie west of the line of ordinary high water as of the date of taking. The appellant claimed, however, 3.65 acres that lie to the east of the high water mark.

B. The evidence on this point consisted of an original patent from the State of California to the predecessor in interest of the appellant, which patent used the "bank of the Sacramento River" as the east boundary. (See Pl. Ex. No. 1.) This exhibit was placed in evidence by the appellee.

C. Appellant put on the witness stand Harold Prescott, an engineer, who testified that he surveyed the property and searched the various records, and found the property consisted of 22.65 acres. (Rep. Tr. p. 3.)

D. Appellant placed into evidence a Sheriff's Deed (Def. Ex. D), which deed predated the patent presented by appellee. (Pl. Ex. No. 1.)

The Sheriff's Deed (Exhibit D) has for its southeastern corner the northeastern corner of the Township of Washington. (See testimony of Prescott, Rep. Tr. p. 11.)

If the appellee's position, as found by the Court is correct, then we would find, according to the description in the patent and deed that the two corners; e.g., the northeast corner of the Township of Washington would not match, and the northeast corner of the Township of Washington would lie some 160 feet to the east of the southwest corner of the Simmonds property.

As this was the only evidence submitted on the matter, the result is that the finding as to acreage is not supported by the evidence, the Court should have found that the land consisted of 22.65 acres.

CONCLUSION.

It is therefore submitted that this Court should reverse the judgment entered herein on the verdict of the jury and on the judgment of the Court and remand the cause to the District Court for a new trial.

Dated, San Francisco, California,
August 31, 1951.

Respectfully submitted,
CHARLES R. GARRY,
JULIUS M. KELLER,
Counsel for Appellant.

No. 12969

**In the United States Court of Appeals
for the Ninth Circuit**

HARRY SIMMONDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

A. DEVITT VANECH,

Assistant Attorney General,

M. MITCHELL BOURQUIN,

*Special Assistant to the Attorney
General, San Francisco, Calif.*

ROGER P. MARQUIS,

HAROLD S. HARRISON,

Attorneys,

Department of Justice, Washington, D. C.

FILED

OCT 5 1951

PAUL P. O'BRIEN
CLERK

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Statutes involved.....	2
Questions presented.....	3
Statement.....	3.
Argument:	
I. The district court's ruling that condemnation of fee title was properly authorized is clearly correct.....	8
II. Where the evidence of value in a condemnation proceeding is conflicting, the compensation awarded is within the range of the testimony, and there is no substantial question as to the admissibility of evidence, the award will not be set aside on appeal.....	12
A. The verdict is supported by substantial evidence....	12
B. No error was committed in the admission of evidence of the sale price of the land four years prior to the taking.....	15
III. The court's finding as to the acreage involved is not clearly erroneous.....	19
Conclusion.....	21

CITATIONS

Cases:

<i>Baetjer v. United States</i> , 143 F. 2d 391, certiorari denied 323 U. S. 772.....	15
<i>Block Bounded by Avenue A, In re</i> , 66 Misc. 488, 122 N. Y. S. 321..	16
<i>Bonnarjee v. Pike</i> , 43 Cal. App. 502, 185 Pac. 479.....	16
<i>Boone v. Kingsbury</i> , 206 Cal. 148, 273 Pac. 797, certiorari denied 280 U. S. 517.....	20
<i>Bouchard v. Abrahamsen</i> , 160 Cal. 792, 118 Pac. 233.....	21
<i>Dickinson v. United States</i> , 154 F. 2d 642.....	18
<i>Forest Preserve District v. Hahn</i> , 341 Ill. 599, 173 N. E. 763.....	16
<i>Foster v. United States</i> , 145 F. 2d 873.....	12
<i>Franzen v. Chicago, M. & St. P. Ry. Co.</i> , 278 Fed. 370.....	16, 17
<i>Heckman v. Swet</i> , 99 Cal. 303, 33 Pac. 1099.....	20
<i>Jennings Street, In re</i> , 207 App. Div. 170, 201 N. Y. S. 799.....	16
<i>Love v. United States</i> , 141 F. 2d 981.....	18
<i>Miller v. United States</i> , 137 F. 2d 592.....	12
<i>Murray v. United States</i> , 130 F. 2d 442.....	12
<i>Oakland v. El Dorado Terminal Co.</i> , 41 Cal. App. 2d, 320, 106 P. 2d 100.....	20;

Cases—Continued

Page.

<i>Oakland, City of v. United States</i> , 124 F. 2d 959, certiorari denied 316 U. S. 679	11
<i>Old Dominion Co. v. United States</i> , 269 U. S. 55	9, 10
<i>Packer v. Bird</i> , 137 U. S. 661	20
<i>Phillips v. United States</i> , 148 F. 2d 714	12
<i>Porrata v. United States</i> , 158 F. 2d 788	12
<i>St. Louis v. Turner</i> , 331 Mo. 834, 55 S. W. 2d 942	16
<i>Santa Barbara County v. Hollister Estate Co.</i> , 111 Cal. App. 564, 295 Pac. 866	12
<i>Spring Val. Waterworks v. City, Etc., of San Francisco</i> , 192 Fed. 137	16
<i>Union Hollywood Water Co. v. City of Los Angeles</i> , 184 Cal. 535, 195 Pac. 55	16
<i>United States v. Bechtold Co.</i> , 129 F. 2d 473	16, 17, 18
<i>United States v. Carmack</i> , 329 U. S. 230	11
<i>United States v. Certain Parcels of Land in Philadelphia</i> , 144 F. 2d 626	17
<i>United States v. Ham</i> , 187 F. 2d 265	15
<i>United States v. Hayes</i> , 172 F. 2d 677	12
<i>United States v. Marin</i> , 136 F. 2d 388	9
<i>United States v. Merchants Transfer & Storage Co.</i> , 144 F. 2d 324 ..	11
<i>United States v. Meyer</i> , 113 F. 2d 387, certiorari denied 311 U. S. 706	11
<i>United States v. Montana</i> , 134 F. 2d 194, certiorari denied 319 U. S. 772	11
<i>United States v. State of New York</i> , 160 F. 2d 479, certiorari denied 331 U. S. 832, rehearing denied 331 U. S. 869	9
<i>United States v. 6.74 Acres of Land in Dade County</i> , 148 F. 2d 618 ..	11
<i>United States v. 243.22 Acres of Land, Etc.</i> , 129 F. 2d 678, certiorari denied sub nom. <i>Lambert v. United States</i> , 317 U. S. 698	9
<i>United States v. 13,255.23 Acres of Land, Etc.</i> , 158 F. 2d 868	15
<i>United States ex rel. T. V. A. v. Welch</i> , 327 U. S. 546	9

Statutes:

Act of April 24, 1888, 25 Stat. 94, 33 U. S. C. sec. 591	11
Cal. Civ. Code sec. 830	20

Miscellaneous:

I Nichols, Eminent Domain (2d Ed. 1917) sec. 218	16
II Nichols, Eminent Domain (2d Ed. 1917) sec. 454	16
II Lewis, Eminent Domain (3d Ed. 1909) sec. 664	16
Orgel, Valuation under Eminent Domain (1936) sec. 134	16

In the United States Court of Appeals for the Ninth Circuit

No. 12969

HARRY SIMMONDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVI-
SION*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. The issue of just compensation was determined by a jury whose verdict appears in the record¹ at page 69. Issues other than the value of the property were determined by the court acting without a jury and the findings of the court thereon are contained in its judgment (R. 74-87).² The order of the court finding on the number of acres and against appellant

¹ Reference to the Transcript of Record is herein indicated by "(R.*)" and reference to the Reporter's Transcript of the Testimony is herein indicated by "(Tr.)."

² By stipulation of the parties filed December 14, 1950 (R. 71), findings of fact and conclusions of law, except as are contained in the Final Judgment as to Tract 7 and Tract 7, Parcel 2, the property here involved, were expressly waived.

on other issues reserved to the court for decision appears in the record at page 70.

JURISDICTION

Final judgment was entered in this case on December 14, 1950 (R. 74-87). The jurisdiction of the district court was invoked under 33 U. S. C. sec. 591 and 40 U. S. C. sec. 257. A motion for new trial filed December 20, 1950 (R. 90-91), was denied on February 13, 1951 (R. 94). Notice of appeal was filed on March 9, 1951 (R. 96-97). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATUTES INVOLVED

1. The Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. sec. 591, provides as follows:

* * * That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is

hereby authorized to accept donations of lands or materials required for the maintenance of prosecution of such works.

2. California Civil Code (Chase 1947), sec. 830, provides:

SEC. 830. Land Bordering Navigable Waters.—Except where the grant under which land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high water mark; when it borders on a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

QUESTIONS PRESENTED

1. Whether appellant showed any ground for overturning the determination of the Secretary of the Army that it is necessary and expedient to take the fee title to land being condemned by the United States for improvement of navigation and flood control.

2. Whether, in a condemnation proceeding where the evidence of value is conflicting, the compensation awarded by the verdict of the jury is within the range of the testimony and there is no substantial question as to the admissibility of evidence, the award will be set aside on appeal.

3. Whether the court's finding as to the acreage involved is clearly erroneous.

STATEMENT

On August 5, 1947, the United States filed a complaint in condemnation to acquire the right and ease-

ment for a period of 15 years to deposit spoil and other matter excavated in the improvement and maintenance of the Sacramento River Improvement Project on appellant's property designated as Tract No. 7 (R. 1-8).³ Except for a small house built on piles (R. 67) the land is unimproved property (Br. 7). Thereafter the complaint was amended to provide for the commencing of the 15-year period on June 15, 1943 (R. 10).

By his answer appellant denied, *inter alia*, the authority of the United States to take, the necessity of the taking, the sufficiency of funds available, and the authority to pay just compensation, and that the use constituted a public use (R. 13-18). Appellant later amended his answer to further define the boundary of his tract (R. 21-22).

On August 11, 1948, a declaration of taking (R. 29-31) was filed by the United States in which the description of Tract No. 7 indicated the mean high-tide line as being the shore-line boundary of the tract and a second amendment to the complaint was filed in order that the description of Tract No. 7 would conform to that set forth in the declaration of taking (R. 24). The sum estimated to be just compensation for the taking of Tract No. 7 was \$2,076.00 and a sum was deposited in the registry of the court which included that estimated amount. Judgment on the declaration of taking was entered by the court on August 12, 1948 (R. 33-36). In November 1948, at the re-

³ The complaint also includes a tract designated as No. 8 which was held in different ownership and which is not involved in this appeal.

quest of the Secretary of the Army, a third amendment of the complaint was filed to change the estate taken in Tract No. 7 from an easement to the fee title (R. 44). An amendment to the declaration of taking was made increasing the sum estimated as just compensation to \$4,500.00 and depositing the necessary additional funds into the registry of the court (R. 47-48). The judgment on the declaration of taking was amended accordingly (R. 49).

Appellant filed an answer to the third amendment to the complaint in which he alleged that it was unnecessary for the United States to condemn the fee title and that the taking was "without due process of law and in violation of the Fifth Amendment to the Constitution of the United States" (R. 50).

Pursuant to stipulation, on May 26, 1950, a fourth amendment to the complaint and a declaration of taking No. 2 were filed for the acquisition of additional land designated as Tract No. 7, Parcel 2, which was also then owned by the appellant (R. 56, 58-60). The sum estimated to be just compensation for parcel 2 was \$2,060.00 and that further amount was deposited in the registry of the court (R. 59). Judgment on declaration of taking No. 2 was entered on May 26, 1950, vesting the fee simple title subject to certain easements not here pertinent in the United States (R. 61-63).

Appellant filed an answer to the fourth amendment to the complaint alleging, *inter alia*, that "it is unnecessary for the plaintiff to condemn the fee" of the property involved for the purposes set forth; that the taking is "without due process of law and in vio-

lation of the Fifth Amendment to the Constitution of the United States''; and that Tract No. 7, including Tract No. 7, Parcel 2, contained 21 acres of land (R. 64-66).

At a pretrial conference, counsel for appellant expressly waived proof of paragraphs one, three, and four of the complaint in condemnation (R. 107-108). The first paragraph of the complaint sets out the statutory authority for the suit (R. 1-2) and paragraphs three and four, respectively, contain allegations that the acquisition is for the public benefit and that there is sufficient funds available for the taking (R. 3).

After several continuances, the trial of Tract No. 7 and Tract No. 7, Parcel 2, was heard by the district court with a jury on October 23, 24, and 25, 1950. The amount of acreage condemned was in dispute. The Government offered to stipulate that it took 18.27 acres (Tr. 27) while the landowner claimed that the Government took 22.25 acres, 3.6 of which were under water and below or to the point of the low-water line of the Sacramento River (Tr. 3, 22, 26, 27). The district court reserved the issue of the amount of land taken for decision by the court (Tr. 26, 75, 409, Br. 12). The landowner's claim that the United States did not need the property condemned and that its action in taking the land was in bad faith were also reserved for determination by the court (R. 75-76, Br. 12).

The parties stipulated that the fair market value should be determined as of November 8, 1948, considering the physical condition it was in on October

21, 1944, and that there should be one award covering the compensation and damages for the taking of the property (R. 67). The landowner alleged that the highest and best use of the property condemned was commercial and industrial and that the property contained soil which could be sold "for the fertilization of growth of vegetation" (Tr. 60, 61). He valued the property at \$20,000.00 per acre (Tr. 64). Other witnesses for the landowner valued the property at \$3,500.00 per acre and \$1,800.00 per acre, respectively (Tr. 131, 184). They also valued the small frame house on the premises at \$2,500.00 and \$2,000.00, respectively (Tr. 139, 184).

Witnesses on behalf of the Government, Messrs. Chris R. Jones and William Thielbar, testified that the highest and best use of the property was for summer recreation, i. e., the part-time rental of space to campers with auto trailers and to persons who desired to construct their own temporary buildings and pay a ground rental for the use of the property (Tr. 230, 317). Mr. Jones valued the property at \$6,500.00 (Tr. 234). On an acreage basis this amounts to approximately \$300.00 per acre, inasmuch as \$1,000.00 was allowed for the little house (Tr. 234). Mr. Thielbar valued the property at \$350.00 per acre ⁴ and the building at \$500.00 (Tr. 305-306).

The jury returned its verdict finding the value of the property to be \$375.00 per acre and the building

⁴ Though the Reporter's Transcript of the Testimony indicates the answer of this witness as being "\$50.00 an acre" (Tr. 305), reference to pages 338, 339, and 378 of the transcript will show that the valuation was \$350.00 rather than \$50.00 per acre.

to be \$1,250.00 (R. 69). The court found the number of acres to be 18.27 as contended by the United States and it found against the defendant upon the other issues submitted to it (R. 70, 75-76, 77, 79, 80). Accordingly, final judgment was entered on December 14, 1950 (R. 74-87). The sum of \$8,305.71, representing all sums and interest thereon which were awarded by that judgment, has been paid to the appellant (R. 98). The landowner's motion for a new trial filed December 20, 1950 (R. 90), was denied on February 13, 1951 (R. 95). This appeal followed.

ARGUMENT

I

The District Court's ruling that condemnation of fee title was properly authorized is clearly correct

Originally appellant objected to the taking of any interest in his property (R. 13-18). That position was abandoned, however, and the sole complaint now urged is that the taking of fee title rather than a lesser interest was not authorized. Thus, it is uncontroverted—and could not be—that the acquisition by condemnation of some interest in appellant's land for the purpose of improving navigation on the Sacramento River is a proper exercise of the federal power of eminent domain. The argument that a fee title could not be so condemned is plainly erroneous for several reasons.

Appellant's argument rests largely on the notion that the condemnation power may be exercised only for the purpose of physical use of the property by the Government and the title which may be taken is

limited by such physical use. While this may be the law of some states, the federal power of eminent domain is not so limited. Condemnation by the Federal Government is permissible wherever a proper federal purpose be served even though physically the land taken may be used by or even conveyed to private persons. *United States v. Marin*, 136 F. 2d 388 (C. A. 9, 1943); *United States v. 243.22 Acres of Land, Etc.*, 129 F. 2d 678 (C. A. 2, 1942), certiorari denied *sub nom. Lambert v. United States*, 317 U. S. 698 (1943). In determining whether fee title or some lesser interest should be taken, the federal officers may properly take into account economic factors. As the court said in *United States ex rel. T. V. A. v. Welch*, 327 U. S. 546, 554 (1946): "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." Thus, fee title may be condemned in order to salvage the value of improvements which were placed upon land under a lease. *Old Dominion Co. v. United States*, 269 U. S. 55 (1925). And an easement for a railroad line may be legitimately extended for a period of time sufficient to liquidate the investment after the Government's need for the line has ceased. *United States v. State of New York*, 160 F. 2d 479 (C. A. 2, 1947), certiorari denied, 331 U. S. 832, rehearing denied, 331 U. S. 869. Appellant's idea (Br. 17) that the Government, in the instant case, could not condemn fee title for the incidental purpose of recouping, through enhancement of land value, some of the expense of dredging is a mistaken view of the federal law. Thus

the fact that the estate taken was changed from an easement to a fee, does not, as appellant argues (Br. 17), prove that only an easement could be taken.

Likewise, the contention that the Secretary of the Army has not exercised his administrative authority lacks merit. It was the request of the Secretary that led to the amendment of the condemnation complaint and an amended declaration of taking was signed by the Acting Secretary of the Army (R. 47-48). Moreover, as to Parcel 2 of Tract No. 7, the acquisition from the beginning was, at the request of the Secretary of the Army, of the fee title (R. 56, 58-59). Appellant seizes upon the word "advisable" used in the letter of the Secretary of the Army requesting the amendment to take fee title (Pl.'s Ex. 15) and attempts thereby to deny the evident intention of the Secretary of the Army (Br. 13). This is merely a play on words. In rejecting a somewhat similar attack as to whether a letter of the Secretary of War sufficiently authorized the proceedings, the court said in *Old Dominion Co. v. United States*, 269 U. S. 55, 67 (1925), "We perceive no requirement that the Secretary should go further than to apply to the Attorney General. Moreover, the Secretary's letter certainly showed that he thought the suit would be advantageous to the Government, and we should be slow to suppose that the precise shade of his opinion upon the point affected the jurisdiction of the Court."

It is thus clear that the Secretary of the Army has exercised his discretion to determine that it is advisable to take fee title in this case. It is equally clear that Congress has delegated to the Secretary the au-

thority to make this determination. As the court said in *United States v. Meyer*, 113 F. 2d 387 (C. A. 7, 1940), certiorari denied, 311 U. S. 706 (1940) in rejecting a similar attack upon a determination that fee title should be taken under the Act of April 24, 1888, 25 Stat. 94, 33 U. S. C. sec. 591 (the very statute involved here) (p. 392):

Defendants insist that a fee simple title was not necessary to accomplish the purposes contemplated by the legislation. But the power to decide whether such a title was needed is, by the legislation, conferred upon the Secretary and, in the absence of bad faith or abuse of discretion such determination is not subject to judicial review [many citations]. Determination of the extent, amount or title of property to be taken, by an Administrative Department, is, in the absence of bad faith, final [many citations].

More recent authorities to the same effect include *United States v. Carmack*, 329 U. S. 230, 247 (1946); *City of Oakland v. United States*, 124 F. 2d 959, 964 (C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942); *United States v. Montana*, 134 F. 2d 194, 197 (C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943); *United States v. 6.74 Acres of Land in Dade County*, 148 F. 2d 618, 620 (C. A. 5, 1945); cf. *United States v. Merchants Transfer & Storage Co.*, 144 F. 2d 324, 326 (1944). The cited cases, particularly the *Montana* and the *Meyer* cases, make it clear that local law relating to proof of "necessity" is not controlling here (Cf. Br. 14-19).

II

Where the evidence of value in a condemnation proceeding is conflicting, the compensation awarded is within the range of the testimony, and there is no substantial question as to the admissibility of evidence, the award will not be set aside on appeal

A. The verdict is supported by substantial evidence

The issue of value was here determined by a jury. The verdict of the jury, and the judgment of the court based upon that verdict, are within the range of the evidence (R. 69, 74-87, Tr. 63-64, 65, 131, 184, 233-234, 305-306). It is now well-settled that in such circumstances the award will not be set aside on appeal. See e. g., *Porrata v. United States*, 158 F. 2d 788, 790-791 (C. A. 1, 1947); *Phillips v. United States*, 148 F. 2d 714, 716 (C. A. 2, 1945); *Miller v. United States*, 137 F. 2d 592, 594 (C. A. 3, 1943); *Foster v. United States*, 145 F. 2d 873, 877 (C. A. 8, 1944); *Murray v. United States*, 130 F. 2d 442, 444 (App. D. C. 1942); *Santa Barbara County v. Hollister Estate Co.*, 111 Cal. App. 564, 295 Pac. 866 (1931). Cf. *United States v. Hayes*, 172 F. 2d 677, 680 (C. A. 9, 1949). The language of the court in *Foster v. United States*, *supra*, is particularly appropriate here inasmuch as in the instant case as there the trial court denied a motion for a new trial by the landowner (R. 94). There the court said (145 F. 2d at p. 877):

The value so determined by the jury was within the scope of the testimony, and hence, it is sustained by substantial evidence. We do not pass upon the weight of the evidence, and the trial court has denied defendant's motion

for a new trial. In these circumstances, the verdicts, being supported by substantial evidence, even though there may be a conflict in the evidence, must be sustained. *Ramming Real Estate Co. v. United States*, 8 Cir., 122 F. 2d 892; *Love v. United States*, *supra* [141 F. 2d 981]; *O'Donnell v. United States*, 8 Cir., 131 F. 2d 882.

Thus, the fact that the verdict of the jury is within the scope of the evidence is sufficient for it to be deemed to be sustained by substantial evidence. However, by any standard the award in the instant case is sustained by substantial evidence. Mr. Chris R. Jones, who appellant recognizes (Br. 21) was well-qualified, testified, *inter alia*, that he had appraised property in the vicinity of the property here involved, that he had made sales of property in the area, that his firm has some 30 or 35 large subdivisions in the area, that he investigated the property in question some four or five times for the purpose of arriving at an estimate of the reasonable market value of the property (Tr. 223-224). He testified further that he investigated sales of similar property and discussed the matter with adjoining property owners (Tr. 226) and that he knew of the sale to the appellant of the property here involved (Tr. 232-233). In this background, Mr. Jones testified that the property in question had a fair market value of \$6,500 which was "Approximately three hundred dollars an acre allowing a thousand dollars for the little house" (Tr. 234). Appellant's attempt (Br. 21-25) to discredit Mr. Jones' valuation by reference to his testimony on

cross-examination as to the values that would have resulted if the Government had merely taken a 15-year easement does not indicate any error as to the fair market value of the property in 1948. Instead it represents an attempt to recover the enhancement which would have resulted from the exercise of the Government's 15-year easement. Plainly, appellant has no legal claim to such enhancement.

Mr. William M. Thielbar, another well-qualified witness (Tr. 295-296, 302), testified, *inter alia*, that he had been familiar with the Simmond's property for many years, that he had made a very careful and thorough analysis of the property, that he discussed the property with several adjoining property owners; that he compared the property with other similar property in the area and investigated sales of such property (discussing a number of such similar sales in some detail); that he discussed the property with appellant's predecessor in title and that he took into consideration the sale price of the property itself (Tr. 296-297, 306-316). Mr. Thielbar testified that the fair market value of the property here involved was \$350.00 an acre and that the small house built on piles (R. 67) had a value of \$500.00 (Tr. 305-306). The evidence further shows that appellant purchased the very property here involved on an installment contract dated October 21, 1944, for \$4,500 payable \$1,100 down and \$50.00 a month (Tr. 64-66.)⁵

⁵ The summary of the evidence we have given clearly shows that both of the Government's valuation witnesses considered such proper bases for valuation as the physical characteristics of the land, its location, the highest and best use of the land in view of the physical characteristics and location, and sales of comparable

There was thus ample evidence to support the verdict of the jury finding the value of the land to be \$375.00 per acre and the value of the improvements to be \$1,250 (R. 69).

B. No error was committed in the admission of evidence of the sale price of the land four years prior to the taking

It is equally clear that appellant's contention (Br. 20) that the court erred in admitting evidence of the price appellant paid for the property is also entirely without merit. Since compensation is measured by market value, prior sales of the same property, reasonably recent and not forced, are obviously the best evidence of market value. *United States v. Ham*, 187 F. 2d 265, 269-270 (C. A. 8, 1951); *United States v. 13,255.23 Acres of Land, Etc.*, 158 F. 2d 868, 876 (C. A. 3, 1945); *Baetjer v. United States*,

lands in the vicinity and thus that their opinion as to the fair market value of the property concerned was not on the "primary basis" of the sale of the property to the appellant, as appellant contends (Br. 20, paragraph number 3). Moreover, it was perfectly proper to consider such prior sale in arriving at their estimates of the fair market value of the property as is shown *infra*, pp. 15-19. The record clearly disproves appellant's contention (Br. 25) that Mr. Thielbar "made no independent appraisal but relied only on the contract of sale by which appellant acquired the property and on appraisements by others." Indeed, the very portion of the testimony quoted by appellant (Br. 26) specifically shows that Mr. Thielbar formed his opinion of value on the "basis of the foundation of comparable sales" and by using his "own mind and opinion" (Tr. 367-368). Incidentally, it is noteworthy that although pursuant to stipulation the value of the property was to be determined as of November 8, 1948, but "in its physical condition as of October 21, 1944" (R. 67), appellant's witness Kenneth B. King (Br. 27-29) testified on cross-examination that "I don't know anything about it [the physical condition of the property in question] in 1944" (Tr. 142).

143 F. 2d 391, 397 (C. A. 1, 1944), certiorari denied 323 U. S. 772 (1944); *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C. A. 8, 1942); *Franzen v. Chicago, M. & St. P. Ry. Co.*, 278 Fed. 370 (C. A. 7, 1921); *Forest Preserve District v. Hahn*, 341 Ill. 599, 173 N. E. 763 (1930); *St. Louis v. Turner*, 331 Mo. 834, 843, 55 S. W. 2d 942 (1932); *In re Jennings Street*, 207 App. Div. 170, 201 N. Y. S. 799, 800 (1st Dept. 1923); *In re Block Bounded by Avenue A*, 66 Misc. 488, 122 N. Y. S. 321 (S. Ct. 1910); I Nichols, Eminent Domain (2d Ed. 1917) sec. 218; II Nichols, Eminent Domain (2d Ed. 1917) sec. 454; II Lewis, Eminent Domain (3d Ed. 1909) sec. 664; Orgel, Valuation under Eminent Domain (1936) sec. 134. Cf. *Spring Val. Waterworks v. City, Etc., of San Francisco*, 192 Fed. 137, 165 (N. D. Cal. 1911). Local state cases are in agreement. *Union Hollywood Water Co. v. City of Los Angeles*, 184 Cal. 535, 538, 195 Pac. 55, 56 (1920); *Bonnarjee v. Pike*, 43 Cal. App. 502, 506, 185 Pac. 479, 481 (1919). In *Baetjer v. United States*, *supra*, the court said (143 F. 2d at p. 397):

Clearly such transactions [arm's-length transactions in lands in the vicinity of those taken at about the time of taking] have a tendency to show fair market value. In fact, *in the absence of recent transactions of a like nature involving the land taken itself*, they are the best evidence of market value. [Emphasis added.]

Indeed, where the sale is between a willing buyer and a willing seller and is not so remote as to render the price of no bearing upon the present market value, it is reversible error to reject evidence of such

prior sale as proof of the value of the land. *United States v. Ham*, 187 F. 2d 265, 269-270 (C. A. 8, 1951); *United States v. Certain Parcels of Land in Philadelphia*, 144 F. 2d 626, 629-630 (C. A. 3, 1944).

As shown by the above-cited cases, a judicial discretion as to admission of evidence respecting the price paid by the owner for property taken in condemnation proceedings is vested in the trial court. The exercise of that discretion will not ordinarily be disturbed on appeal. *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C. A. 8, 1942); *Frauzen v. Chicago, M. & St. P. Ry. Co.*, 278 Fed. 370, 373 (C. A. 7, 1921). In the latter case the court said:

In reference to the admission of evidence respecting * * * the purchase price of the land in question a few years preceding, the rules of law are too well settled to call for restatement. * * * whether the previous sale of the land in question * * * may or should be shown, are matters concerning which the trial judge can best decide. Recognizing that this evidence is received for the purpose of placing a jury in a better position to pass judgment upon the ultimate question of fact—the value of the land condemned and the injury to the balance—it is usual for the court to permit a rather wide range of investigation. * * * Perhaps such evidence sometimes assumes too great importance. But the trial judge is in the best possible position to decide whether the situation has been clearly and satisfactorily presented, and he has it within his reasonable discretion to order or withhold

a view of the premises to better enable the jury to understand and weigh such evidence.

The admission of evidence of a sale of the property condemned has been sustained even though a considerable period of time elapsed between the sale and the taking. *Dickinson v. United States*, 154 F. 2d 642, 643 (C. A. 4, 1946) (sale in 1937 held properly admitted when taking was in 1943); *Love v. United States*, 141 F. 2d 981, 983 (C. A. 8, 1944) (sale in 1933 held properly admitted when taking was in 1940); *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C. A. 8, 1942) (sale in 1925 held properly admitted when taking was in 1939). As is spelled out in the *Dickinson* and *Bechtold* cases particularly, the circumstance of lapse of time between the sale and taking of the property, involving changed conditions of times, goes to the weight rather than the admissibility of the evidence. In the *Dickinson* case the court said (154 F. 2d at p. 643): "The period of time which had elapsed since the sale in 1937 was undoubtedly substantial, involving as it did the changed conditions of the times, but these circumstances went to the weight rather than the admissibility of the evidence and were the subject of comment in the argument to the jury on the appellant's behalf." The language of the court in the *Bechtold* case is as follows (129 F. 2d at p. 479):

The fact that the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility. *Metropolitan Life Ins. Co. v. Armstrong*, 8 Cir., 85 F. 2d

187; *Chapman & Dewey Lbr. Co. v. Hanks*, 6 Cir., 106 F. 2d 482. A judicial discretion as to the admission of evidence of this character is vested in the trial court and that discretion will not ordinarily be disturbed on appeal.

III

The court's finding as to the acreage involved is not clearly erroneous

The Government contended that appellant's property amounted to 18.27 acres (Tr. 27) but appellant contends it consists of 22.65 acres (Br. 34). This discrepancy results from the fact, not mentioned by appellant, that part of the land he claims lies below low-water mark of the Sacramento River. Thus, appellant's witness Prescott agreed that there were 18 and a fraction acres of land west (that is, landward) of the low-water mark of the Sacramento River (Tr. 20-21). Appellant's claim to an additional 3 and a fraction acres relates to land under water (Tr. 3, 22, 26, 27).⁶ The boundary running into the water was based upon a sheriff's deed dated 1858 (Tr. 25-26; Def's. Ex. D). As appellant recognizes (Br. 34), his title stems from a later patent from the State of California and not from the sheriff's deed. The patent described the east boundary of the property as the "bank of the Sacramento River" (Pl's. Ex. 1, Tr. 24-25). It does not appear whether the 1858 deed represents an erroneous description of the high-water mark of the Sacramento River or whether the differ-

⁶ There was some disparity in the amount of the fractions which was resolved by agreement (Tr. 27).

ence is attributable to changes which have occurred since that time. Under any view, appellant does not own the 3.6 acres which are located in the bed of the river.

The Sacramento River at the point here in question is subject to tides (see E. g., Tr. 385). The Supreme Court of California has stated that "The proprietary rights of the owner of land bordering on tide water do not extend beyond the ordinary high water mark." *Boone v. Kingsbury*, 206 Cal. 148, 170, 273 Pac. 797, 807 (1928), certiorari denied 280 U. S. 517 (1929); Cal. Civ. Code sec. 830. Also, the Sacramento River is a navigable stream (Cal. Harbors and Navigation Code, sec. 105) and "The right of a riparian owner of land abutting on navigable water does not include the title and possession of submerged lands * * *." *Oakland v. El Dorado Terminal Co.*, 41 Cal. App. 2d 320, 329, 106 P. 2d 1000, 1004-1005 (1940); *Packer v. Bird*, 137 U. S. 661, 669 (1891). In the latter case the Supreme Court of the United States stated, "* * * we accept the view of the Supreme Court of California in its opinion as expressing the law of that State, 'that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream.' *Lux v. Haggin*, 69 California, 255." And in *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099, 1101 (1893), the court pointed out (p. 308) that a patent by the State of swamp lands "conveyed to high water mark on the southerly bank of the river as it existed at the date of the patent, or as thereafter changed by washing or cutting away by the action of the water, or by accretions added by the

same agency.” See also *Bouchard v. Abrahamsen*, 160 Cal. 792, 796, 118 Pac. 233, 235 (1911). Thus, passing the other weaknesses in appellant’s claim,⁷ it is clear that he had no legal title to the additional 3.6 acres.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be affirmed.

A. DEVITT VANECH,
Assistant Attorney General,

M. MITCHELL BOURQUIN,
Special Assistant to the Attorney General,
San Francisco, Calif.

ROGER P. MARQUIS,

HAROLD S. HARRISON,

Attorneys,

Department of Justice Washington, D. C.

OCTOBER 1951.

⁷ For example, it does not appear that the line drawn by appellant’s witness was based upon or conformed to any description appearing in appellant’s chain of title. Appellant’s amended answer (R. 21) describes his land as bounded on the east by the Sacramento River.

No. 12,969

IN THE

United States Court of Appeals
For the Ninth Circuit

HARRY SIMMONDS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES R. GARRY,

JULIUS M. KELLER,

68 Post Street, San Francisco 4, California,

Counsel for Appellant.

FILED

OCT 15 1951

PAUL P. O'BRIEN

Subject Index

	Page
Preliminary statement	1
Argument	3
I.	
The appellee did not show, either by pleading or proof, the necessity or authority to condemn appellant's fee	3
II.	
Admission of evidence of purchase price was error	9
Conclusion	10

Table of Authorities Cited

Cases	Pages
City of Denver v. Schmitt, 11 Colo. 56, 16 Pac. 842	10
City of Portland v. Tegard, 64 Ore. 404, 129 Pac. 155	10
Old Dominion Land Co. v. U. S., 269 U.S. 55, 70 L. Ed. 165	3, 7
Oregon Railway v. Eastbrook, 54 Ore. 405, 102 Pac. 1014	10
TVA v. Welch, 327 U.S. 550	3, 5
U. S. v. Marin, 136 Fed. (2d) 388 (9th Cir.).....	6
U. S. v. State of New York, 160 Fed. (2d) 479 (2nd Cir.)	3, 4
U. S. v. 243.22 acres of land, 129 Fed. (2d) 678.....	6

Constitutions

United States Constitution, Fifth Amendment	7
---	---

No. 12,969

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HARRY SIMMONDS,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S REPLY BRIEF.

PRELIMINARY STATEMENT.

Appellant has read and compared the facts set forth in his opening brief and those set forth by appellee in that section of its brief entitled "Statement". With but one exception, appellant finds that the two are substantially the same. The exception is that appellee states (Brief p. 6) that at a pre-trial conference, counsel for appellant had waived proof of Paragraphs I, III, and IV of the complaint in condemnation. (Tr. of Rec. pp. 1-2.)

While it is not disputed that counsel at the pre-trial conference did waive proof of the matters alleged in the said paragraphs of the complaint, appellee fails to place the time of said conference, which was held

March 15, 1948 (Tr. of Rec. pp. 107-108), or some eight months prior to appellee's filing that amendment to its complaint which sought to condemn appellant's fee, rather than an easement to his property.

At the time of the pre-trial conference, appellant did not question, nor does he now question, the right and authority of the Government to condemn a fifteen-year easement for the purposes set forth in its complaint in condemnation. Appellant objected then, and does now object, to the taking of his fee.

Appellant filed his written objections to the filing of the amendment to the complaint, setting forth that the proposed amendment did not show the necessity for the taking of appellant's property in fee simple. (Tr. of Rec. p. 43.) Thereafter and after the Court had allowed the amendment to be filed, appellant in his answer objected to the taking of his fee and denied the authority, the right, and the necessity of the Government to condemn the fee. He has consistently maintained that the proper authorities had never made a determination of the need of the Government to more than an easement to the property in question.

The basic question here to be determined is whether or not under the pleadings, the evidence, and the facts as set forth, the Government has established a case showing that a determination of the necessity to take the fee was actually made, or that the Government actually needs more than an easement to appellant's property.

ARGUMENT.

I.

THE APPELLEE DID NOT SHOW, EITHER BY PLEADING OR PROOF, THE NECESSITY OR AUTHORITY TO CONDEMN APPELLANT'S FEE.

This matter was fully covered in appellant's opening brief. (pp. 8-19.) However, it is felt that an answer to appellee's argument is necessary.

Appellee in its brief takes a new and novel position: that the Government may take for public use more property or a greater estate therein than is actually necessary for the public use for which the property is sought, on the basis that it may incidentally recoup some of the expenses incurred in taking and using the property by a future enhancement of the value of the property condemned. (Appellee's Brief p. 9.)

This is not the law, and the cases cited by the appellee do not so hold.

The Government relies most strongly on *Old Dominion Land Co. v. U. S.* (269 U.S. 55 [70 L. Ed. 165]), on *U. S. v. State of New York* (160 Fed. (2d) 479 [2nd Cir.]), and on *TVA v. Welch* (327 U.S. 550).

In *Old Dominion Land Co. v. U. S.*, supra, the Court refused to go into the question of whether the taking was for a public use, since Congress had already made a determination of this fact. Further, no facts were brought out which would lead the Court to believe that such determination was not in good faith. In that case, the Government had leased land and had erected warehouses thereon. After the lease

had expired and the lessor refused to renew it, condemnation of the fee was sought for the purpose of permitting the Government to salvage the warehouses, since under the lease the warehouses had to be removed within thirty days or they would be forfeited to the lessor. Congress by a special appropriation act had provided money specifically for the purpose of taking this property and had thereby authorized the condemnation of the property. While the Court did state that economic factors may be taken into consideration, it went on to add:

“* * * But it is said that the taking was not for a public use, because it is said that the Secretary of War at least was thinking not of a future use of the land by the public or the government, but of saving the country from the loss of the buildings. *We shall not inquire whether this purpose was or was not so reasonably incidental to the necessary, hurried transactions during the war as to warrant the taking* * * * Congress has declared the purpose to be a public use, by implication if not by express words * * * *Its decision is entitled to deference until it is shown to be an impossibility.* But the military purposes mentioned at least may have been entertained, and they clearly were for a public use.” (Emphasis added.)

By the institution of the case of *U. S. v. State of New York*, supra, the Government sought to condemn land for the duration of the war and for fifteen years thereafter. The purpose was to condemn the land and to build a railroad thereon. The fifteen-year pe-

riod after the war was for the purpose of liquidating the investment in the railroad. The Court holds that the determination of the Secretary of War is reasonable and that it was for a public use. The Court refused to go into the argument of whether Courts will question the validity of a determination of necessity by the Government, and states:

“Whether there is a real divergence in principle we need not determine, since all authorities show the scope of judicial review is limited in any event. Here we surely cannot construe the Secretary’s determination as either arbitrary or capricious or as evidence of bad faith * * * *It is conceded that the construction of the railroad and its removal within a reasonable period thereafter is a legitimate public use.* Indeed, the concession—which involves an offer of agreement to a judicial provision fixing the proper period of liquidation after the termination of the emergency—would seem to grant the vital element of the Government’s case; we might well question how the single act of taking for a stated purpose can now be held partially valid and partially invalid until it is judicially rewritten.

But be that as it may, we may regard the appropriate liquidation of an investment for a public purpose, itself such a public aim.” (Emphasis added.)

The other case relied upon by the appellee, *TVA v. Welch*, supra, fails to supply the authority sought by appellee. A very complicated transaction was involved in this case—the building of a dam which would cause the flooding of thousands and thousands

of acres of land, including a highway. This highway was the only means of access to property owned by some two hundred and forty inhabitants. The tremendous expenditure of Federal, state, and county funds to build a new road to serve these inhabitants did not seem warranted by the number of families affected. In order to alleviate this situation, an agreement was worked out among the Government, the state, and the county involved, which provided payment by the Government to the state and the county for the loss they suffered because of the condemnation of the property and the loss of the highway, and to the persons involved in condemning their property. The condemned property was then to be turned over to another branch of the Government for a park reserve. Surely no one can question the public use of this property, and it is to be noted that a definite determination of the need was made.

The other cases relied on by the appellee, *U. S. v. Marin* (136 Fed. (2d) 388, 9th Circ.) and *U. S. v. 243.22 acres of land* (129 Fed. (2d) 678), are certainly not in point. In both instances the Government had sought to condemn land for the express purpose of turning the property over to factories engaged in war production. No one can question the public use to which these properties would be put.

The fact that the Government might condemn property for a greater period of time than required for its actual immediate use for the purpose of liquidating a substantial improvement placed thereon is certainly not the same thing as condemning property

in fee when an easement will suffice. This is more true when no substantial improvements are to be built, and when the property is taken merely for the purpose of dumping silt and spoil from a navigable stream.

If the position of the appellee is carried to its logical conclusion, then the Government when condemning property for the purpose of erecting a permanent improvement thereon, could also condemn all of the surrounding property on the basis that the proposed improvement will enhance the land values of the surrounding property and thus, the Government could recoup some of its expenses by a subsequent sale of the property condemned for which it had no actual use.

This, of course, would be in direct violation of the Constitution of the United States, which provides in the Fifth Amendment “* * * nor shall private property be taken for *public use* without just compensation.” The words in the Constitution are “public use”. Surely the taking of property for the speculative probability that the land may be enhanced in value is not a “use” of the property, nor in any sense of the word a “public” one.

The Government cannot take property for any use but a public one. The rule that the Courts will not interfere with a determination as to what is public use in the absence of bad faith applies only when it is first shown to be a public one. Or, as stated in *Old Dominion Land Co. v. U. S.*, supra, “Its (the determining authority) decision is entitled to deference until it is shown to be an impossibility.” Here there

is an impossibility. The Government does not need a fee for the mere purpose of dumping spoils from the Sacramento River.

Thus, appellant's position that no determination of necessity had been made in this case takes on added significance. The argument by the appellee that appellant's position is a mere play on words is thereby shown to be of no substance; the fact of the matter is that the Secretary of the Army made no determination of need or necessity because in good conscience, he could not, and did not. Therefore, he used the word "advisable". It may have been advisable to take the fee so that the Government could speculate as to the future value of the property, but there was and is no need nor necessity for the taking of the fee for the purposes to which it was going to be put.

The word "advisable" may be used by an inferior to a superior, suggesting that the superior make a decision. It is not the language ordinarily employed by a person in authority who has made a decision. If a decision had actually been made as to necessity in this case, the Secretary of the Army would have used words connoting such a decision and not state that he believed it "advisable", as he did when he first wrote concerning the taking of the easement.

Appellant has no quarrel with the principles laid down in *U. S. v. Meyers* (cited by appellee, p. 11, and by appellant in his opening brief). Nor does he quarrel with the more recent cases set forth by appellee. However, in each of these cases, the Secretary of the Army or other authorized persons had made a determination

as to the necessity for the Government to condemn the property. *Appellant's contention is that no such determination has ever been made in this case.* The Secretary had not determined that it was necessary to have the fee. He merely thought it "advisable".

Appellee raises the question that as to Parcel 2 of Tract 7, the acquisition from the beginning was at the request of the Secretary of the Army for a fee title. We see no point therein. The acquisition of Parcel 2 of Tract 7 was made subsequent to the amendment to take the fee and was filed merely for the purpose of correcting a previously erroneous description of the property.

It is therefore submitted that the position taken by the appellant in his opening brief that appellee has failed to show, either by pleading or proof, the public interest or necessity of taking the fee rather than the easement, is a sound one and that the judgment should be reversed, and the matter remanded for a new trial.

II.

ADMISSION OF EVIDENCE OF PURCHASE PRICE WAS ERROR.

Appellant believes that the arguments relative to the other specifications of error were sufficiently covered in his opening brief.

We should like to point out, however, that with respect to the admission of evidence concerning the original purchase price of the property, there is

authority to the effect that evidence of a purchase price paid two and a half years prior to the time of condemnation was too remote and not a proper criterion of present value.

City of Portland v. Tegard, 64 Ore. 404, 129 Pac. 155.

See also *Oregon Railway v. Eastbrook*, 54 Ore. 405, 102 Pac. 1014, which holds that purchase price of twelve to fifteen years previous is no criterion, as does *City of Denver v. Schmitt*, 11 Colo. 56, 16 Pac. 842.

We reiterate that the admission of evidence as to the purchase price of this property was erroneous, not only because of the remoteness of time, but because the Government witnesses most strongly relied upon this evidence as their basis for the present-day value of the property in question.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the District Court should be reversed, and the matter remanded for a new trial on all issues.

Dated, San Francisco, California,
October 15, 1951.

Respectfully submitted,

CHARLES R. GARRY,

JULIUS M. KELLER,

Counsel for Appellant.

No. 12970

United States
Court of Appeals
for the Ninth Circuit.

See vol. 2684

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ELEANORE LANGER,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

No. 12970

United States
Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ELEANORE LANGER,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	13
Appearances	1
Certificate of Clerk	37
Decision	30
Designation of Contents of Record on Review ...	36
Docket Entries	3
Findings of Fact and Opinion	15
Notice of Filing Petition for Review to Dana Lantham, etc.	34
Notice of Filing Petition for Review to Eleanore Langer	32
Proof of Service	33
Petition	6
Ex. A—Notice of Deficiency	10
Petition for Review	31
Statement of Points	35

APPEARANCES

For Petitioner:

AUSTIN H. PECK, JR., ESQ.,

DANA LATHAM, ESQ.,

HENRY C. DIEHL, ESQ.

For Respondent:

L. C. AARONS, ESQ.

The Tax Court of the United States

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1947

Dec. 17—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 18—Copy of petition served on General Counsel.

Dec. 22—Request for hearing at Los Angeles, California filed by taxpayer. 12/29/47 granted.

1948

Jan. 26—Answer filed by General Counsel.

Jan. 27—Copy of answer served on taxpayer. Los Angeles Calendar.

Dec. 23—Hearing set Feb. 7, 1949 Los Angeles.

1949

Feb. 9—Hearing had before Judge Johnson on merits. Petitioner's oral motion to consolidate with Dkt. 16756, 18396 and 18397—granted. Oral motions of petitioners in Dkts. 18396 and 18397 were also granted to file amended petitions. Respondent granted time on oral motion to file amended answers. Submitted. Stipulation

1949

of facts with Exhibits 7 to 25 attached, filed at hearing also amended petitions in Nos. 18396 and 18397 were filed. Petitioner's brief due 3/11/49, Respondent's brief 4/11/49 and Reply brief 5/2/49.

Mar. 14—Motion for extension to 3/15/49 to file the attached brief, brief lodged, filed by taxpayer. 3/15/49 granted and served.

Mar. 18—Transcript of hearing 2/9/49 filed.

Apr. 11—Brief filed by General Counsel. Copy served 4/12/49.

Apr. 25—Reply brief filed by taxpayer. 4/26/49. Copy served.

Sept. 29—Findings of fact and opinion rendered. Judge Johnson. Decision will be entered for respondent.

Sept. 29—Decision entered. Judge Johnson, Div. 10.

Dec. 12—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.

Dec. 12—Notice of filing petition for review with affidavit of service attached, filed.

Dec. 12—Designation of record and statement on points filed by taxpayer.

Dec. 12—Notice of filing designation of record and statement of points with affidavit of service attached.

Dec. 28—Motion for continuance to 1/9/50 to file a counter Designation of record filed by General Counsel.

1950

- Jan. 11—Notice transmitting the original papers which constitute the record on review to the Ninth Circuit.
- Aug. 21—Mandate from the U. S. Court of Appeals, 9th Circuit reversing and remanding Tax Court's decision filed.
- Nov. 24—Hearing set 1/22/51 Los Angeles, Calif.

1951

- Jan. 12—Findings of Fact and Opinion rendered. Johnson J. Decision will be entered under Rule 50. Copy served.
- Mar. 30—Respondent's Computation for entry of decision filed.
- Mar. 30—Consent to computation for entry of decision filed.
- Apr. 3—Decision entered, J. Johnson, Div. 10.
- May 3—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by General Counsel.
- May 8—Notice of filing petition for review mailed to Mrs. Eleanore Langer with Proof of service attached thereto filed.
- May 8—Notice of filing petition for review mailed to Dana Latham, Esq. or Austin H. Peck, Jr. Esq. or Henry C. Diehl, Esq. with proof of service thereon, filed.
- May 31—Statement of Points filed by General Counsel with statement of service by mail thereon.
- May 31—Designation of record filed by General Counsel with statement of service by mail thereon.

The Tax Court of the United States

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated September 24, 1947, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 939 South Figueroa Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on September 24, 1947.

III.

The taxes in controversy are federal income taxes for the calendar year 1944, in the amount of \$3,-099.06.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services paid to her husband and attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1944 and up to and including the present date, petitioner's husband has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles.

California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner's husband monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938 and 1939 said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner's husband the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner's husband.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner's husband a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner's husband the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner's husband for the years 1937, 1938, and 1939.

(5) In preparing her federal income tax return for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM, AHP

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

December 11, 1947

State of California,
County of Los Angeles—ss.

Eleanore Langer, being first duly sworn, deposes and says: that she is the petitioner in the foregoing petition; that she has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of her knowledge and belief.

/s/ ELEANORE LANGER.

Subscribed and sworn to before me this 13th day of December, 1947.

[Seal] D. C. WALTER,
Notary Public in and for the County of Los Angeles,
State of California.

EXHIBIT A

Form 1279

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of Internal Revenue Agent

In Charge,
Los Angeles Division.
LA:IT:90D:LHP

Sept. 24, 1947

Mrs. Eleanore Langer,
c/o Hotel Figueroa,
939 South Figueroa Street,
Los Angeles 15, California.

Dear Mrs. Langer:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$3,099.06, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this

letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

Enclosures :

Statement.

Form of waiver.

STATEMENT

LA:IT:90D:LHP

Mrs. Eleanore Langer
c/o Hotel Figueroa
939 South Figueroa Street
Los Angeles 15, California

Tax Liability for the Taxable Year Ended December 31, 1944
Income tax deficiency\$3,099.06

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 21, 1947.

Adjustment to Net Income
Taxable Year Ended December 31, 1944

Net income as disclosed by return.....	\$31,037.39
Additional income:	
(a) Compensation unreported	500.00
Net income adjusted	<u>\$31,537.39</u>

Explanation of Adjustment

(a) There is added to income the amount of \$500.00 representing your community share of the value of living quarters and meals furnished you by your husband's employer, during this taxable year, which you failed to report in your return.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$5,000.00 (your community one-half of \$10,000.00) attributable to services rendered by your husband in the years 1937, 1938 and 1939, which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,000.00 represents income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$31,537.39
Less: Excess of net long-term capital gain over net short-term capital loss.....	<u>1,125.00</u>
Ordinary net income.....	\$30,412.39
Less: Surtax exemption.....	<u>500.00</u>
Balance (surtax net income).....	\$29,912.39
Surtax on \$29,912.39.....	13,165.68
Ordinary net income.....	\$30,412.39
Less: Normal tax exemption.....	<u>500.00</u>
Balance subject to normal tax.....	\$29,912.39
Normal tax (3% of \$29,912.39).....	<u>897.37</u>
Partial tax	\$14,063.05
Plus: 50 per cent of \$1,125.00.....	<u>562.50</u>
Alternative tax	<u>\$14,625.55</u>

Computation of Tax	
Taxable Year Ended December 31, 1944	
Net income adjusted.....	\$31,537.39
Less: Surtax exemption.....	500.00
Surtax net income.....	\$31,037.39
Surtax	\$13,863.18
Net income adjusted	\$31,537.39
Less: Normal-tax exemption.....	500.00
Net income subject to normal tax.....	\$31,037.39
Normal tax at 3%.....	931.12
Total normal tax and surtax.....	\$14,794.30
Alternative tax	\$14,625.55
Correct income tax liability.....	\$14,625.55
Income tax liability shown on return, account No. 9022948.....	\$11,526.49
Deficiency of income tax.....	\$ 3,099.06

Received and Filed T.C.U.S. December 17, 1947.

Served December 18, 1947.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are income

taxes for the calendar year 1944. Denies the remainder of the allegations contained in paragraph III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

(1) to (4) inclusive. Denies the allegations contained in sub-paragraphs (1) to (4) inclusive of paragraph V of the petition.

(5) Admits the allegations contained in sub-paragraph (5) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
Special Attorney, Bureau of
Internal Revenue.

Received and filed T.C.U.S. January 26, 1948.

The Tax Court of the United States
Docket Nos. 16756, 16757, 18396 and 18397

Promulgated January 12, 1951

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

On remand from the United States Court of Appeals for the Ninth Circuit, held:

(1) Back pay of \$10,000 received by decedent R. L. Langer in 1944, and of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey in 1944 and 1945, respectively, was paid pursuant to prior agreement and legal obligation within the meaning of Regulations 111, section 29.107-3.

(2) Above back pay of \$10,000 received by decedent R. L. Langer constituted more than 15 per cent of the gross income of R. L. Langer and Eleanore Langer in 1944, and petitioners' Estate of R. L. Langer, Deceased; Eleanore Langer, Executrix, and Eleanore Langer are entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

(3) Above back pay of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey constituted less than 15 per cent of the gross income of petitioners C. Abbott Lindsey and Pauline Lindsey in 1944 and 1945, respectively, and they are not entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

AUSTIN H. PECK, JR., ESQ.,

For the Petitioners.

L. C. AARONS, ESQ.,

For the Respondent.

These proceedings return to us by mandate of the United States Court of Appeals for the Ninth Circuit, issued under its opinion of July 14, 1950, 183 Fed. (2d) 758, reversing our prior decision of September 29, 1949, in these proceedings (Findings of Fact and Opinion reported at 13 T.C. 419). The mandate directs:

It is now here ordered and adjudged by this court, that the decision of the said Tax Court of the United States in each of these causes be, and hereby is reversed, and that these causes be, and hereby are remanded to the said Tax Court with directions to proceed in accord with the opinion of this court, and to dispose of other issues presented on the record.

We therefore proceed as directed by the mandate. In addition to the facts heretofore found, which by reference are adopted here, we find on the same record as follows:

Findings of Fact

The net rentals from the Clifton Hotel were apportioned on Schedule B of the 1944 returns of R. L. Langer and Eleanore Langer as follows:

Net Rentals\$14,498.01

Apportionment among owners:

R. L. & Eleanore Langer. $\frac{1}{2}$ \$7,249.00

Nelda Clinton $\frac{3}{8}$ 5,436.75

Mary R. Brown..... $\frac{1}{8}$ 1,812.26 \$14,498.01

The net profits from the Figueroa Hotel were

apportioned on Schedule C of the Langers' 1944 returns as follows:

Net Profit	\$59,441.42
Clifford Clinton	\$21,165.53
R. M. Callicott.....	7,055.18
	<hr/>
	\$28,220.71
R. L. & Eleanore Langer.	31,220.71 \$59,441.42
	<hr/>

This represents a distribution of $\frac{3}{8}$ of the net profits from the Figueroa Hotel to Clifford Clinton, $\frac{1}{8}$ to R. M. Callicott, and $\frac{1}{2}$ to the Langers, with \$3,000 additional, or \$250 per month, being distributed to the Langers as administration expense, in accordance with a joint venture agreement between R. L. Langer, Clifford Clinton and R. M. Callicott, evidenced by the following memorandum executed September 22, 1945:

Memorandum of Agreement

This memorandum, executed September 22nd, 1945, by R. L. Langer, Clifford E. Clinton and Ransom M. Callicott, of Los Angeles, California, evidences and confirms the terms of a financing and profit-sharing agreement in the nature of a limited joint venture entered into between them before execution of the lease hereinafter mentioned and ever since effective, as follows:

1. Upon the consideration and agreement herein expressed the parties joined in providing and contributing the moneys paid by said Langer in acquiring said lease and commencing operations

thereunder; which lease dated June 1, 1945, (and recorded in Book 13415, pp. 270-279, of Official Records of Los Angeles County, Cal.) was made by Figueroa Hotel Company, as lessor, to said Langer, as lessee, affecting, for ten years then beginning, the property and furnishings thereof known as "Figueroa Hotel," at Figueroa Street and Olympic Boulevard in said City of Los Angeles, and was extended by agreement between said parties thereto, dated July 21, 1939, for an additional term ending May 31, 1949.

2. Upon such consideration it was and is so agreed the parties shall be entitled to and that there shall be shared between them in the proportions of:

Langer	one-half,
Clinton	three-eighths, and
Callicott	one-eighth,

all net profits and losses accruing from operation of said property while under such lease and extension or any further such extension or lease to him, or which he shall be instrumental in obtaining as to said property for any member of his family or corporation in which he or they shall be interested, or resulting from any sale or disposition of any such leasehold (this agreement to continue in effect so long as any such lease or leasehold shall be in effect); and that said other parties shall be entitled, though not required, to participate, in the proportions aforesaid, with said Langer or any such lessee in any opportunity to him or such lessee to pur-

chase said property during or at expiration of any such leasehold.

Such net profit from operation of said property shall include all gross receipts and revenue accruing and received therefrom, after deduction of only current expenses of such operation, including rental and other charges payable under such then lease; provided while Langer shall hereafter personally continue management of such operation he may deduct and retain from such profit for each month, before division thereof and in like manner as an expense of such operation, \$350.00 (the similar deduction of \$250.00 per month for approximately three years next prior hereto being approved).

Accounting and settlement in accordance herewith has been made as to such net profit for the period ending September 22, 1945, and shall be final save for errors. Further such accounting and payment shall be made monthly. Langer shall keep and maintain at a convenient place at Los Angeles full and complete books, accounts and records of such operation and profit, and the same shall be open to inspection of the other parties and their representatives at all reasonable times with the right to make extracts or copies.

3. Langer shall endeavor to procure extensions of such existing leasehold or further leases of said property as possible from time to time so that this agreement may continue effective as aforesaid. He shall promptly notify the other parties in advance of each such further extension or new lease and proposals therefor. So far as possible each thereof

shall be made only on terms first approved in writing by the other parties hereto; but should that be impossible Langer may nevertheless make the same on other terms, subject to the right of the other parties at their election to terminate this agreement effective at commencement of the term of any such lease or extension on terms not so approved by them.

4. During continuance hereof Langer and his successors shall not, without the other parties' written consent, transfer, assign or hypothecate the then leasehold interest in such property or consent to modification or termination thereof, or sublet the property other than as incident to usual hotel operation, and shall promptly discharge the obligations of such leasehold and continue operation of said property in the same general manner as heretofore but shall not incur any unusual expense which might affect such profits without written consent of the parties.

5. Under and pursuant to such agreement, the subject matter thereof, and the respective rights and interests of the parties thereunder were and are only such as shall be consistent with and not in violation, or constituting in creation thereof, any violation of said lease.

The respective interests of the parties hereunder are assignable and shall be unaffected by death of any of them; and the same and this agreement and its obligations shall inure to the benefit of and bind the parties, their heirs, successors and assigns in

accordance with the terms thereof and as if parties hereto in the capacity of the party through whom claiming.

In Witness Whereof, they execute this instrument on the date aforesaid.

[Signed] R. L. LANGER,

[Signed] CLIFFORD E. CLINTON,

[Signed] RANSOM M. CALLICOTT.

The Clifton Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Nelda Clinton and Mary R. Brown. The Figueroa Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Clifford Clinton and R. M. Callicott. The Langers' distributive share of the net profits in that year from such joint ventures was \$7,249, or \$3,624.50 apiece, from the Clifton Hotel, and \$31,220.71, or \$15,610.35 apiece, from the Figueroa Hotel.

The back pay of \$10,000 received by R. L. Langer in 1944 from the Commodore Hotel Company, allocable \$5,000 to R. L. Langer and \$5,000 to Eleanore Langer, comprised more than 15 per cent of their respective gross incomes of \$30,729.45 and \$31,854.43.

The gross income reported by the Lindseys in 1944 was \$44,183.52, or \$22,091.76 apiece. Their gross income for 1944 was actually \$101,569.40, or \$50,784.70 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$57,385.88. The back pay of \$10,000

received by C. Abbott Lindsey in 1944 from the Commodore Hotel Company, allocable \$5,000 to Lindsey and \$5,000 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

In 1945 the total receipts of the Commodore Cafe, as reported by the Lindseys, were \$144,897.99, cost of goods sold \$58,911.83, other business deductions \$65,564.72. The gross income reported by the Lindseys in 1945 was \$52,493.82, or \$26,246.91 apiece. Their gross income for 1945 was actually \$118,058.54, or \$59,029.27 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$65,564.72. The back pay of \$11,500 received by C. Abbott Lindsey in 1945 from the Commodore Hotel Company, allocable \$5,750 to Lindsey and \$5,750 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

Opinion

Johnson, Judge:

The Court of Appeals for the Ninth Circuit determined in *Estate of R. L. Langer v. Commissioner*, 183 Fed. (2d) 758; reversing 13 T.C. 419, that the deferment in payment of the amounts of back salary here in question was caused by an event similar to receivership within the requirement of section 107(d)(2)(A), Internal Revenue Code, contrary to the contention of respondent and to our prior holding. Respondent, however, also contends that section 107(d) is not applicable because the employer was under no obligation to pay in prior years, and because the payments were less than 15 per cent of

petitioners' gross incomes, which he says should be computed to comprise receipts undiminished by the expenses of businesses from which they derived income. Pursuant to mandate we now consider these contentions, which we found it unnecessary to consider under our prior holding.

Respondent points out that under Regulations 111, section 29.107-3, "back pay" does not include "additional compensation for past services when there was no prior agreement or legal obligation to pay such additional compensation * * *." He maintains that except as to part of the year 1937, petitioners' salaries were authorized retroactively by the board of directors of the Commodore Hotel Company on January 3, 1944, that there was no prior agreement or legal obligation to pay such salaries, and that the resolution of the board of directors of April 14, 1937, that salaries of \$600 a month be paid Langer and Lindsey from January 1, 1937, and "every month hereafter" was intended for one year only. Petitioners maintain that the 1937 authorization was a continuing one and extended beyond the year.

We think the facts clearly support petitioners on this issue. The salaries were voted in 1937 and we do not understand the resolution to cover only 1937, especially in view of the phrase "every month hereafter." But whatever period the resolution covered, the presumption is that petitioners' services after 1937 were not gratuitous and that the parties intended the same compensation. As said in 6A Cal. Jur. 1125:

If an officer is hired at a fixed salary and continues in the same employment after expiration of the term of his original hiring without a new contract, it is presumed that the parties intend the same compensation.

See also, Fletcher, *Cyclopedia of Corporations*, Vol. 16, pp. 440-41; *Caminetti v. Prudence Mut. Life Ins. Assn.*, 62 Cal. App. (2d) 945, 146 Pac. (2d) 15; *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128. The facts show that the Commodore Hotel Company failed to pay salaries from 1937 to 1942 because it was not able to do so, not because it was not liable to do so. The 1944 authorization recognized that there were owing to the officers specific amounts of back salary for 1937, 1938, 1939, 1940, 1941, and 1942. In other words, the 1944 authorization was not a retroactive authorization but a recognition of a liability that already existed, and it merely directed the satisfaction of that liability as soon as possible. The fact that the corporation paid the back salaries without approval of the Salary Stabilization Unit of the Treasury after being informed by the latter that it could do so without approval only if "there was a bona fide contractual liability on October 3, 1942," also supports our conclusion that such a liability existed. We can not assume that the corporation violated the law.

Respondent also contends that petitioners have failed to meet the requirement of section 107(d) that in order for a taxpayer to be entitled to the benefits of that section, the amount of back pay

received or accrued during the taxable year must exceed 15 per cent of the taxpayer's gross income for that year. Petitioners contend that only the net profits derived from the operation of the Commodore Cafe in 1944 and 1945, i.e., gross receipts less cost of goods sold and other business deductions, are includible in the gross incomes of the Lindseys in 1944 and 1945 for purposes of section 107(d). They concede that "if gross receipts are to be used in determining the percentage under section 107(d), the Lindseys are not entitled to the relief which they have claimed. Likewise, if gross sales, less cost of goods sold, is the correct figure, the relief is lost." In effect, they are claiming that the adjusted gross incomes of the Lindseys in 1944 and 1945, which include only net profits from business, should be the figures upon which the 15 per cent should be computed for purposes of section 107(d).

We disagree. The statute plainly says "gross income," not "adjusted gross income." Whenever Congress has intended a percentage to apply to "adjusted gross income," it has said so, as in the allowance for charitable contributions under section 23(o), or for medical expenses under section 23(x). Similarly, when it has intended a percentage to apply to "gross income," as in section 275(c), it has also said so. We can not therefore impute an intention on the part of Congress to refer to "adjusted gross income" in section 107(d) when it has plainly said "gross income."

In defining "gross income from business," section 29.22(a)-5 of Regulations 111, provides:

In the case of a manufacturing, merchandis-

ing, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold.¹ * * *

The back pay received by Lindsey of \$10,000 in 1944 and \$11,500 in 1945, allocable half to his wife, not being more than 15 per cent of the gross incomes of the Lindseys of \$101,569.40, or \$50,784.70 apiece, in 1944, and \$118,058.54, or \$59,029.27 apiece, in 1945, computed to include gross receipts from the Commodore Cafe less cost of goods sold, they are not entitled to the relief of section 107(d).

As for the Langers, the other petitioners herein, the facts show that they reported income in 1944 from the operation of the Clifton Hotel and the Figueroa Hotel. In each hotel the interest of the Langers was 50 per cent. The other owners of the Clifton Hotel were Nelda Clinton, who owned 37½ per cent, and Mary R. Brown, who owned 12½ per cent. The other owners of the Figueroa Hotel were Clifford E. Clinton, who owned 37½ per cent, and R. N. Callicott, who owned 12½ per cent. The Langers reported on the schedules of their 1944 returns the gross receipts from these two hotels,

¹This fundamental concept of "gross income" from business as gross receipts less cost of goods sold has stood unchallenged for many years. See *Mim.* 2915 and *I.T.* 1241, *I-1 C.B.* 233, 234.

but they brought forward to the face of the returns only their 50 per cent share of the net profits from each hotel, i.e., gross receipts less business expenses less the 50 per cent share of the net profits apportioned to the other owners. Petitioners contend that only this net amount is includible in the Langers' gross income for purposes of section 107(d). They maintain that these two hotels were operated by the Langers and the co-owners as joint ventures. They point out that if the joint ventures had filed partnership returns as they should have,² the business expenses of the joint ventures would have been deducted on the partnership returns and only the Langers' distributive share of the net profits from these ventures would have been reported on their individual returns.

Respondent does not question the division of the income from these hotels between the Langers and their co-owners, and he concedes that if partnership returns had been filed, he would not question the

²Sec. 3797. Definitions.

Internal Revenue Code.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) Partnership and Partner.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

Langers' inclusion of only their share of the net profits from such ventures in their individual gross incomes for purposes of section 107(d). But he maintains that in view of the failure to file partnership returns petitioners can not now contend that these were joint ventures and compute the Langers' individual gross incomes as though partnership returns had been filed.

We do not agree. The determination of whether or not an undertaking is a joint venture or partnership does not depend on whether or not a partnership return was filed, and respondent gives no other reason for challenging the existence of these joint ventures. We have found on the facts that joint ventures did exist between the Langers and their co-owners in the operation of the Figueroa and Clifton Hotels in 1944. Accordingly, partnership returns should have been filed and the Langers are entitled to include, as they did, in their gross incomes for 1944 only their distributive shares of the net profits of the joint ventures. The \$10,000 in back pay received by Langer in 1944, allocable \$5,000 to him and \$5,000 to his wife, constituted more than 15 per cent of their gross incomes (\$30,729.45 for Langer and \$31,854.43 for his wife) so computed, and, being otherwise within the provisions of section 107(d), Internal Revenue Code, petitioners Estate of R. L. Langer and Eleanore Langer are entitled to the benefits of that section with respect to that back pay.

Decisions will be entered under Rule 50.

Served January 12, 1951.

The Tax Court of the United States
Washington

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to mandate of the Court of Appeals for the Ninth Circuit filed August 17, 1950, and Findings of Fact and Opinion of this Court promulgated January 12, 1951, the respondent herein, on March 30, 1951, filed a computation of tax, in which petitioner filed an agreement on March 30, 1951. Now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1944 in the amount of \$2,785.38, which amount was paid after the mailing of the notice of deficiency.

/s/ LUTHER A. JOHNSON,
Judge.

Entered Apr. 3, 1951.

Served Apr. 4, 1951.

United States Court of Appeals

For the Ninth Circuit

T. C. Docket No. 16757

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

ELEANORE LANGER,

Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions for review by the United States Court of Appeals for the Ninth Circuit of the decision entered by The Tax Court of the United States on April 3, 1951, ordering and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,785.38, which amount was paid after the mailing of the notice of deficiency. The taxpayer's income tax return for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The question presented for adjudication is whether the taxpayer's receipt of back pay during the taxable year 1944 constituted more than 15 per cent of her gross income received during that year. The Tax Court holds that in computing the 15 per cent limitation it is necessary to include in gross income only the distributive shares of the net

profits realized from the operation of a joint venture conducted under the name of the Figueroa Hotel. The Commissioner contends that the decision conflicts with the definition of "gross income from business" contained in Section 29.22(a)-5 of Regulations 111 and with I.T. 3981, 1949-2 C.B. 78.

The Commissioner files his petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Filed T.C.U.S. May 3, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Mrs. Eleanore Langer, c/o Figueroa Hotel, 939
South Figueroa Street, Los Angeles 15, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore

rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

PROOF OF SERVICE OF NOTICE OF FILING
PETITION FOR REVIEW

T. C. Docket No. 16757

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

ELEANORE LANGER,
Respondent on Review.

To the United States Court of Appeals for the
Ninth Circuit:

State of California,
County of Los Angeles—ss.

Frank O. Schelfeffer, being first and duly sworn, says: I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this Notice of Filing Petition for Review was issued.

At 12:55 p.m. on the third day of May, 1951, I served the annexed Notice of Filing Petition for Re-

view on the following Respondent on Review named therein at the place set opposite her name, by delivering to and leaving with her a copy of said Notice of Filing Petition for Review and a copy of the Petition for Review and at the same time exhibiting the original of the Notice of Filing Petition for Review:

Name: Eleanore Langer.

Place of Service: 6130 Blackburn Avenue, Los Angeles, California.

[Seal] /s/ FRANK O. SCHELFEFFER.

Subscribed and sworn to before me this 4th day of May, 1951.

[Seal] HAZEL J. IVINS,
Notary Public.

My commission expires Nov. 9, 1952.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Dana Latham, Esquire, or, Austin H. Peck, Jr., Esquire, or Henry C. Diehl, Esquire, 1112 Title Guarantee Building, 411 West Fifth Street, Los Angeles 13, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951,

file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Service acknowledged.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Commissioner of Internal Revenue, petitioner on review herein, relies upon the following points in support of his position:

The Tax Court of the United States erred:

1. In holding and deciding that the "back pay" received by the taxpayer in 1944 exceeded 15 per cent of the taxpayer's gross income for this year.

2. In failing to hold and decide that the "back pay" received by the taxpayer in 1944 did not exceed 15 per cent of the taxpayer's gross income for this year.

3. In holding and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,785.38.

4. In failing to hold and decide that there is a deficiency for the year 1944 in the amount of \$3,099.06.

5. In that its opinion and decision are not supported by the evidence and are contrary to the law and regulations promulgated thereunder.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of The Tax Court of the United States:

Will you please prepare, certify, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit the following portions

of the record before The Tax Court of the United States:

- (1) Petition.
- (2) Answer.
- (3) Findings of Fact and Opinion of the Tax Court.
- (4) Decision of the Tax Court.
- (5) Petition for review, together with proof of service and Statement of Points.
- (6) This designation.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Respondent on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 8, inclusive, constitute and are the original papers and proceeding on file in my office as called for by the "Designation of Contents of Record On Review" in the proceeding before The Tax Court of The United States in the above-entitled proceeding and in which the respondent in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together

with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of June, 1951.

[Seal]

VICTOR S. MERSCH,

Clerk, the Tax Court of the
United States.

[Endorsed]: No. 12970. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Eleanore Langer, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed June 11, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12971

United States
Court of Appeals
for the Ninth Circuit.

See vol. 2684

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE of R. L. LANGER, Deceased; ELEANOR
LANGER, Executrix,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

No. 12971

United States
Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE of R. L. LANGER, Deceased; ELEANOR
LANGER, Executrix,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	13
Appearances	1
Certificate of Clerk	38
Decision	30
Designation of Contents of Record on Review ..	37
Docket Entries	3
Findings of Fact and Opinion	15
Notice of Filing Petition for Review to Dana Lantham	35
Notice of Filing Petition for Review to Mrs. Eleanore Langer	32
Proof of Service	33
Petition	6
Ex. A—Notice of Deficiency	10
Petition for Review	31
Statement of Points	35

APPEARANCES

For Petitioner :

DANA LATHAM, ESQ.,

AUSTIN H. PECK, JR., ESQ.,

HENRY C. DIEHL, ESQ.,

For Respondent :

L. C. AARONS, ESQ.

The Tax Court of the United States

Docket No. 16756

R. L. LANGER,

Amended Caption:

ESTATE OF R. L. LANGER, Dec'd.; ELEA-
NORE LANGER, Executrix (See Order of
8/31/48),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

Dec. 17—Petition received and filed. Taxpayer noti-
fied. Fee paid.

Dec. 18—Copy of petition served on General Coun-
sel.

Dec. 22—Request for hearing at Los Angeles, Cali-
fornia, filed by taxpayer. 12/29/47 granted.

1948

Jan. 26—Answer filed by General Counsel.

Jan. 27—Copy of answer served on taxpayer. Los
Angeles Calendar.

Aug. 30—Motion for substitution of party, filed by
taxpayer.

Aug. 31—Order amending caption to read, Estate
of R. L. Langer, Deceased, Eleanore
Langer, Executrix, entered.

Dec. 23—Hearing set February 7, 1949, in Los An-
geles, California.

1949

- Feb. 9—Hearing had before Judge Johnson on merits. Petitioner's oral motion to consolidate with Dkt. 16757, 18396 and 18397—Granted. Oral motions of petitioners in Dkts. 18396 and 18397 were also granted to file amended petitions. Respondent granted time or oral motion to file amended answers. Submitted. Stipulation of facts with Exhibits 7 to 25 attached filed at hearing also amended petition in Nos. 18396 and 18397 were filed. Petitioner's brief due 3/11/49, Respondent's brief 4/11/49 and Reply brief 5/2/49.
- Mar. 14—Motion for extension to 3/15/49 to file the attached brief, brief lodged, filed by taxpayer. 3/15/49 granted and served.
- Mar. 18—Transcript of hearing 2/9/49 filed.
- Apr. 11—Brief filed by General Counsel. Copy served 4/12/49.
- Apr. 25—Reply brief filed by taxpayer. 4/26/49 copy served.
- Sept. 29—Findings of fact and opinion rendered. Judge Johnson. Decision will be entered for respondent.
- Sept. 29—Decision entered. Judge Johnson. Div. 10.
- Dec. 12—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.
- Dec. 12—Notice of filing petition for review with affidavit of service attached, filed.
- Dec. 12—Designation of record and statement of points filed by taxpayer.

1949

- Dec. 12—Notice of filing designation of record and statement of points with affidavit of service attached.
- Dec. 28—Motion for continuance to 1/9/50 to file a counter designation of record filed by General Counsel.

1950

- Jan. 11—Notice transmitting the original papers which constitute the record on review to the Ninth Circuit.
- Aug. 21—Mandate from the U. S. Court of Appeals, 9th Circuit reversing and remanding Tax Court's decision filed.
- Nov. 24—Hearing set 1/22/51 Los Angeles, Calif.

1951

- Jan. 12—Findings of Fact and Opinion rendered. Johnson J. Decision will be entered under Rule 50. Copy served.
- Mar. 30—Respondent's Computation for entry of decision filed.
- Mar. 30—Consent to computation for entry of decision filed.
- Apr. 3—Decision entered, J. Johnson, Div. 10.
- May 3—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by General Counsel.
- May 8—Notice of filing petition for review mailed to Mrs. Eleanore Langer with Proof of service attached thereto filed.

1951

- May 8—Notice of filing petition for review mailed to Dana Latham, Esq., or Austin H. Peck, Jr., Esq., or Henry C. Diehl, Esq., with proof of service thereon, filed.
- May 31—Statement of Points filed by General Counsel with statement of service by mail thereon.
- May 31—Designation of record filed by General Counsel with statement of service by mail thereon.

The Tax Court of the United States
Docket No. 16756

R. L. LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated September 24, 1947, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 939 South Figueroa Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on September 24, 1947.

III.

The taxes in controversy are federal income taxes for the calendar year 1944, in the amount of \$3,086.48.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar

year 1944 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1944 and up to and including the present date, petitioner has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938 and 1939, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner for the years 1937, 1938, and 1939.

(5) In preparing his federal income tax return for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

December 11, 1947.

State of California,
County of Los Angeles—ss.

R. L. Langer, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of his knowledge and belief.

/s/ R. L. LANGER.

Subscribed and sworn to before me this 12th day of December, 1947.

[Seal] /s/ ISABEL V. HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of Sept. 24, 1947.
Internal Revenue Agent in Charge
Los Angeles Division,
LA:IT:90D:LHP

Mr. R. L. Langer
c/o Hotel Figueroa
939 South Figueroa Street
Los Angeles 15, California

Dear Mr. Langer:

You are advised that the determination of your income tax liability for the taxable year ended De-

cember 31, 1944, discloses a deficiency of \$3,086.48, as shown in the statement attached.

In accordance with the provisions of existing internal revenue law notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of waiver

STATEMENT

LA:IT:90D:LHP

Mr. R. L. Langer
 c/o Hotel Figueroa
 939 South Figueroa Street
 Los Angeles 15, California

Tax Liability for the Taxable Year Ended December 31, 1944
 Income tax deficiency.....\$3,086.48

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 21, 1947.

Adjustment to Net Income
 Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$29,912.40
 Additional income:
 (a) Compensation unreported 500.00
 Net income adjusted\$30,412.40

Explanation of Adjustment

(a) There is added to income the amount of \$500.00 representing your community share of the value of living quarters and meals furnished you by your employer, during this taxable year, which you failed to reported in your return.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$5,000.00 (your community one-half of \$10,000.00) attributable to the years 1937, 1938 and 1939, which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,000.00 represents income taxable at the rates in effect in the year received.

Computation of Tax

Taxable Year Ended December 31, 1944

Net income adjusted	\$30,412.40	
Less: Surtax exemption.....	500.00	
	<hr/>	
Surtax net income	\$29,912.40	
Surtax		\$13,165.69
Net income adjusted.....	\$30,412.40	
Less: Normal-tax exemption	500.00	
	<hr/>	
Net income subject to normal tax.....	\$29,912.40	
Normal tax at 3%.....		897.37
		<hr/>
Correct income tax liability.....		\$14,063.06
Income tax liability shown on return account No. 9005526		10,976.58
		<hr/>
Deficiency of income tax.....		\$ 3,086.48

Received and filed T.C.U.S. December 17, 1947.

Served December 18, 1947.

Received T.C.U.S. August 21, 1950.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are income

taxes for the calendar year 1944. Denies the remainder of the allegations contained in paragraph III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

(1) to (4), inclusive. Denies the allegations contained in subparagraphs (1) to (4), inclusive, of paragraph V of the petition.

(5) Admits the allegations contained in subparagraph (5) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and filed T.C.U.S. January 26, 1948.

The Tax Court of the United States
Docket Nos. 16756, 16757, 18396 and 18397

Promulgated January 12, 1951

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

On remand from the United States Court of Appeals for the Ninth Circuit, held:

(1) Back pay of \$10,000 received by decedent R. L. Langer in 1944, and of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey in 1944 and 1945, respectively, was paid pursuant to prior agreement and legal obligation within the meaning of Regulations 111, section 29.107-3.

(2) Above back pay of \$10,000 received by decedent R. L. Langer constituted more than 15 per cent of the gross income of R. L. Langer and Eleanore Langer in 1944, and petitioners' Estate of R. L. Langer, Deceased; Eleanore Langer, Executrix, and Eleanore Langer are entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

(3) Above back pay of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey constituted less than 15 per cent of the gross income of petitioners C. Abbott Lindsey and Pauline Lindsey in 1944 and 1945, respectively, and they are not entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

AUSTIN H. PECK, JR., ESQ.,

For the Petitioners.

L. C. AARONS, ESQ.,

For the Respondent.

These proceedings return to us by mandate of the United States Court of Appeals for the Ninth Circuit, issued under its opinion of July 14, 1950, 183 Fed. (2d) 758, reversing our prior decision of September 29, 1949, in these proceedings (Findings of Fact and Opinion reported at 13 T.C. 419). The mandate directs:

It is now here ordered and adjudged by this court, that the decision of the said Tax Court of the United States in each of these causes be, and hereby is reversed, and that these causes be, and hereby are remanded to the said Tax Court with directions to proceed in accord with the opinion of this court, and to dispose of other issues presented on the record.

We therefore proceed as directed by the mandate. In addition to the facts heretofore found, which by reference are adopted here, we find on the same record as follows:

Findings of Fact

The net rentals from the Clifton Hotel were apportioned on Schedule B of the 1944 returns of R. L. Langer and Eleanore Langer as follows:

Net Rentals\$14,498.01

Apportionment among owners:

R. L. & Eleanore Langer $\frac{1}{2}$ \$7,249.00

Nelda Clinton $\frac{3}{8}$ 5,436.75

Mary R. Brown..... $\frac{1}{8}$ 1,812.26 \$14,498.01

The net profits from the Figueroa Hotel were

apportioned on Schedule C of the Langers' 1944 returns as follows:

Net Profit	\$59,441.42
Clifford Clinton	\$21,165.53
R. M. Callicott.....	7,055.18
	<hr/>
	\$28,220.71
R. L. & Eleanore Langer.	31,220.71 \$59,441.42
	<hr/>

This represents a distribution of $\frac{3}{8}$ of the net profits from the Figueroa Hotel to Clifford Clinton, $\frac{1}{8}$ to R. M. Callicott, and $\frac{1}{2}$ to the Langers, with \$3,000 additional, or \$250 per month, being distributed to the Langers as administration expense, in accordance with a joint venture agreement between R. L. Langer, Clifford Clinton and R. M. Callicott, evidenced by the following memorandum executed September 22, 1945:

Memorandum of Agreement

This memorandum, executed September 22nd, 1945, by R. L. Langer, Clifford E. Clinton and Ransom M. Callicott, of Los Angeles, California, evidences and confirms the terms of a financing and profit-sharing agreement in the nature of a limited joint venture entered into between them before execution of the lease hereinafter mentioned and ever since effective, as follows:

1. Upon the consideration and agreement herein expressed the parties joined in providing and contributing the moneys paid by said Langer in acquiring said lease and commencing operations

thereunder; which lease dated June 1, 1945, (and recorded in Book 13415, pp. 270-279, of Official Records of Los Angeles County, Cal.) was made by Figueroa Hotel Company, as lessor, to said Langer, as lessee, affecting, for ten years then beginning, the property and furnishings thereof known as "Figueroa Hotel," at Figueroa Street and Olympic Boulevard in said City of Los Angeles, and was extended by agreement between said parties thereto, dated July 21, 1939, for an additional term ending May 31, 1949.

2. Upon such consideration it was and is so agreed the parties shall be entitled to and that there shall be shared between them in the proportions of:

Langer	one-half,
Clinton.....	three-eighths, and
Callicott.....	one-eighth,

all net profits and losses accruing from operation of said property while under such lease and extension or any further such extension or lease to him, or which he shall be instrumental in obtaining as to said property for any member of his family or corporation in which he or they shall be interested, or resulting from any sale or disposition of any such leasehold (this agreement to continue in effect so long as any such lease or leasehold shall be in effect); and that said other parties shall be entitled, though not required, to participate, in the proportions aforesaid, with said Langer or any such lessee in any opportunity to him or such lessee to pur-

chase said property during or at expiration of any such leasehold.

Such net profit from operation of said property shall include all gross receipts and revenue accruing and received therefrom, after deduction of only current expenses of such operation, including rental and other charges payable under such then lease; provided while Langer shall hereafter personally continue management of such operation he may deduct and retain from such profit for each month, before division thereof and in like manner as an expense of such operation, \$350.00 (the similar deduction of \$250.00 per month for approximately three years next prior hereto being approved).

Accounting and settlement in accordance herewith has been made as to such net profit for the period ending September 22, 1945, and shall be final save for errors. Further such accounting and payment shall be made monthly. Langer shall keep and maintain at a convenient place at Los Angeles full and complete books, accounts and records of such operation and profit, and the same shall be open to inspection of the other parties and their representatives at all reasonable times with the right to make extracts or copies.

3. Langer shall endeavor to procure extensions of such existing leasehold or further leases of said property as possible from time to time so that this agreement may continue effective as aforesaid. He shall promptly notify the other parties in advance of each such further extension or new lease and proposals therefor. So far as possible each thereof

shall be made only on terms first approved in writing by the other parties hereto; but should that be impossible Langer may nevertheless make the same on other terms, subject to the right of the other parties at their election to terminate this agreement effective at commencement of the term of any such lease or extension on terms not so approved by them.

4. During continuance hereof Langer and his successors shall not, without the other parties' written consent, transfer, assign or hypothecate the then leasehold interest in such property or consent to modification or termination thereof, or sublet the property other than as incident to usual hotel operation, and shall promptly discharge the obligations of such leasehold and continue operation of said property in the same general manner as heretofore but shall not incur any unusual expense which might affect such profits without written consent of the parties.

5. Under and pursuant to such agreement, the subject matter thereof, and the respective rights and interests of the parties thereunder were and are only such as shall be consistent with and not in violation, or constituting in creation thereof, any violation of said lease.

The respective interests of the parties hereunder are assignable and shall be unaffected by death of any of them; and the same and this agreement and its obligations shall inure to the benefit of and bind the parties, their heirs, successors and assigns in

accordance with the terms thereof and as if parties hereto in the capacity of the party through whom claiming.

In Witness Whereof, they execute this instrument on the date aforesaid.

[Signed] R. L. LANGER,

[Signed] CLIFFORD E. CLINTON,

[Signed] RANSOM M. CALLICOTT.

The Clifton Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Nelda Clinton and Mary R. Brown. The Figueroa Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Clifford Clinton and R. M. Callicott. The Langers' distributive share of the net profits in that year from such joint ventures was \$7,249, or \$3,624.50 apiece, from the Clifton Hotel, and \$31,220.71, or \$15,610.35 apiece, from the Figueroa Hotel.

The back pay of \$10,000 received by R. L. Langer in 1944 from the Commodore Hotel Company, allocable \$5,000 to R. L. Langer and \$5,000 to Eleanore Langer, comprised more than 15 per cent of their respective gross incomes of \$30,729.45 and \$31,854.43.

The gross income reported by the Lindseys in 1944 was \$44,183.52, or \$22,091.76 apiece. Their gross income for 1944 was actually \$101,569.40, or \$50,784.70 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$57,385.88. The back pay of \$10,000

received by C. Abbott Lindsey in 1944 from the Commodore Hotel Company, allocable \$5,000 to Lindsey and \$5,000 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

In 1945 the total receipts of the Commodore Cafe, as reported by the Lindseys, were \$144,897.99, cost of goods sold \$58,911.83, other business deductions \$65,564.72. The gross income reported by the Lindseys in 1945 was \$52,493.82, or \$26,246.91 apiece. Their gross income for 1945 was actually \$118,058.54, or \$59,029.27 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$65,564.72. The back pay of \$11,500 received by C. Abbott Lindsey in 1945 from the Commodore Hotel Company, allocable \$5,750 to Lindsey and \$5,750 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

Opinion

Johnson, Judge:

The Court of Appeals for the Ninth Circuit determined in *Estate of R. L. Langer v. Commissioner*, 183 Fed. (2d) 758; reversing 13 T.C. 419, that the deferment in payment of the amounts of back salary here in question was caused by an event similar to receivership within the requirement of section 107(d)(2)(A), Internal Revenue Code, contrary to the contention of respondent and to our prior holding. Respondent, however, also contends that section 107(d) is not applicable because the employer was under no obligation to pay in prior years, and because the payments were less than 15 per cent of

petitioners' gross incomes, which he says should be computed to comprise receipts undiminished by the expenses of businesses from which they derived income. Pursuant to mandate we now consider these contentions, which we found it unnecessary to consider under our prior holding.

Respondent points out that under Regulations 111, section 29.107-3, "back pay" does not include "additional compensation for past services when there was no prior agreement or legal obligation to pay such additional compensation * * *." He maintains that except as to part of the year 1937, petitioners' salaries were authorized retroactively by the board of directors of the Commodore Hotel Company on January 3, 1944, that there was no prior agreement or legal obligation to pay such salaries, and that the resolution of the board of directors of April 14, 1937, that salaries of \$600 a month be paid Langer and Lindsey from January 1, 1937, and "every month hereafter" was intended for one year only. Petitioners maintain that the 1937 authorization was a continuing one and extended beyond the year.

We think the facts clearly support petitioners on this issue. The salaries were voted in 1937 and we do not understand the resolution to cover only 1937, especially in view of the phrase "every month hereafter." But whatever period the resolution covered, the presumption is that petitioners' services after 1937 were not gratuitous and that the parties intended the same compensation. As said in 6A Cal. Jur. 1125:

If an officer is hired at a fixed salary and continues in the same employment after expiration of the term of his original hiring without a new contract, it is presumed that the parties intend the same compensation.

See also, Fletcher, *Cyclopedia of Corporations*, Vol. 16, pp. 440-41; *Caminetti v. Prudence Mut. Life Ins. Assn.*, 62 Cal. App. (2d) 945, 146 Pac. (2d) 15; *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128. The facts show that the Commodore Hotel Company failed to pay salaries from 1937 to 1942 because it was not able to do so, not because it was not liable to do so. The 1944 authorization recognized that there were owing to the officers specific amounts of back salary for 1937, 1938, 1939, 1940, 1941, and 1942. In other words, the 1944 authorization was not a retroactive authorization but a recognition of a liability that already existed, and it merely directed the satisfaction of that liability as soon as possible. The fact that the corporation paid the back salaries without approval of the Salary Stabilization Unit of the Treasury after being informed by the latter that it could do so without approval only if "there was a bona fide contractual liability on October 3, 1942," also supports our conclusion that such a liability existed. We can not assume that the corporation violated the law.

Respondent also contends that petitioners have failed to meet the requirement of section 107(d) that in order for a taxpayer to be entitled to the benefits of that section, the amount of back pay

received or accrued during the taxable year must exceed 15 per cent of the taxpayer's gross income for that year. Petitioners contend that only the net profits derived from the operation of the Commodore Cafe in 1944 and 1945, i.e., gross receipts less cost of goods sold and other business deductions, are includible in the gross incomes of the Lindseys in 1944 and 1945 for purposes of section 107(d). They concede that "if gross receipts are to be used in determining the percentage under section 107(d), the Lindseys are not entitled to the relief which they have claimed. Likewise, if gross sales, less cost of goods sold, is the correct figure, the relief is lost." In effect, they are claiming that the adjusted gross incomes of the Lindseys in 1944 and 1945, which include only net profits from business, should be the figures upon which the 15 per cent should be computed for purposes of section 107(d).

We disagree. The statute plainly says "gross income," not "adjusted gross income." Whenever Congress has intended a percentage to apply to "adjusted gross income," it has said so, as in the allowance for charitable contributions under section 23(o), or for medical expenses under section 23(x). Similarly, when it has intended a percentage to apply to "gross income," as in section 275(c), it has also said so. We can not therefore impute an intention on the part of Congress to refer to "adjusted gross income" in section 107(d) when it has plainly said "gross income."

In defining "gross income from business," section 29.22(a)-5 of Regulations 111, provides:

In the case of a manufacturing, merchandis-

ing, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold.¹ * * *

The back pay received by Lindsey of \$10,000 in 1944 and \$11,500 in 1945, allocable half to his wife, not being more than 15 per cent of the gross incomes of the Lindseys of \$101,569.40, or \$50,784.70 apiece, in 1944, and \$118,058.54, or \$59,029.27 apiece, in 1945, computed to include gross receipts from the Commodore Cafe less cost of goods sold, they are not entitled to the relief of section 107(d).

As for the Langers, the other petitioners herein, the facts show that they reported income in 1944 from the operation of the Clifton Hotel and the Figueroa Hotel. In each hotel the interest of the Langers was 50 per cent. The other owners of the Clifton Hotel were Nelda Clinton, who owned 37½ per cent, and Mary R. Brown, who owned 12½ per cent. The other owners of the Figueroa Hotel were Clifford E. Clinton, who owned 37½ per cent, and R. N. Callicott, who owned 12½ per cent. The Langers reported on the schedules of their 1944 returns the gross receipts from these two hotels,

¹This fundamental concept of "gross income" from business as gross receipts less cost of goods sold has stood unchallenged for many years. See *Mim.* 2915 and *I.T.* 1241, *I-1 C.B.* 233, 234.

but they brought forward to the face of the returns only their 50 per cent share of the net profits from each hotel, i.e., gross receipts less business expenses less the 50 per cent share of the net profits apportioned to the other owners. Petitioners contend that only this net amount is includible in the Langers' gross income for purposes of section 107(d). They maintain that these two hotels were operated by the Langers and the co-owners as joint ventures. They point out that if the joint ventures had filed partnership returns as they should have,² the business expenses of the joint ventures would have been deducted on the partnership returns and only the Langers' distributive share of the net profits from these ventures would have been reported on their individual returns.

Respondent does not question the division of the income from these hotels between the Langers and their co-owners, and he concedes that if partnership returns had been filed, he would not question the

²Sec. 3797. Definitions.

Internal Revenue Code.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) Partnership and Partner.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

Langers' inclusion of only their share of the net profits from such ventures in their individual gross incomes for purposes of section 107(d). But he maintains that in view of the failure to file partnership returns petitioners can not now contend that these were joint ventures and compute the Langers' individual gross incomes as though partnership returns had been filed.

We do not agree. The determination of whether or not an undertaking is a joint venture or partnership does not depend on whether or not a partnership return was filed, and respondent gives no other reason for challenging the existence of these joint ventures. We have found on the facts that joint ventures did exist between the Langers and their co-owners in the operation of the Figueroa and Clifton Hotels in 1944. Accordingly, partnership returns should have been filed and the Langers are entitled to include, as they did, in their gross incomes for 1944 only their distributive shares of the net profits of the joint ventures. The \$10,000 in back pay received by Langer in 1944, allocable \$5,000 to him and \$5,000 to his wife, constituted more than 15 per cent of their gross incomes (\$30,729.45 for Langer and \$31,854.43 for his wife) so computed, and, being otherwise within the provisions of section 107(d), Internal Revenue Code, petitioners Estate of R. L. Langer and Eleanore Langer are entitled to the benefits of that section with respect to that back pay.

Decisions will be entered under Rule 50.

Served January 12, 1951.

The Tax Court of the United States
Washington

Docket No. 16756

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to mandate of the Court of Appeals for the Ninth Circuit filed August 17, 1950, and Findings of Fact and Opinion of this Court promulgated January 12, 1951, the respondent herein, on March 30, 1951, filed a computation of tax, in which petitioner filed an agreement on March 30, 1951. Now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46, which amount was paid after the mailing of the notice of deficiency.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered Apr. 3, 1951.

Served Apr. 4, 1951.

United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 16756

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,
Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions for review by the United States Court of Appeals for the Ninth Circuit of the decision entered by the Tax Court of the United States on April 3, 1951, ordering and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46, which amount was paid after the mailing of the notice of deficiency. The decedent's income tax return for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The question presented for adjudication is whether the taxpayer's receipt of back pay during the taxable year 1944 constituted more than 15 per cent of his gross income received during that year. The Tax Court holds that in computing the 15 per cent limitation it is necessary to include in gross

income only the distributive shares of the net profits realized from the operation of a joint venture conducted under the name of the Figueroa Hotel. The Commissioner contends that the decision conflicts with the definition of "gross income from business" contained in Section 29.22(a)-5 of Regulations 111 and with I.T. 3981, 1949-2 C.B. 78.

The Commissioner files his petition for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Filed T.C.U.S. May 3, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Mrs. Eleanore Langer, Executrix, Estate of R. L. Langer, Deceased, c/o Figueroa Hotel, 939 South Figueroa Street, Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for

review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

PROOF OF SERVICE OF NOTICE OF FILING
PETITION FOR REVIEW

T. C. Docket No. 16756

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,
Respondent on Review.

To the United States Court of Appeals for the
Ninth Circuit:

State of California,
County of Los Angeles—ss.

Frank O. Schelfeffer, being first and duly sworn, says: I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding

in which this Notice of Filing Petition for Review was issued.

At 12:55 p.m. on the third day of May, 1951, I served the annexed Notice of Filing Petition for Review on the following Respondent on Review named therein at the place set opposite the name of the Executrix, by delivering to and leaving with the Executrix a copy of said Notice of Filing Petition for Review and a copy of the Petition for Review and at the same time exhibiting the original of the Notice of Filing Petition for Review.

Place of Service: 6130 Blackburn Avenue, Los Angeles, California.

Name: Eleanore Langer, Executrix of the Estate of R. L. Langer, Deceased.

/s/ FRANK O. SCHELFEFFER.

Subscribed and sworn to before me this 4th day of May, 1951.

[Seal] HAZEL J. IVINS,
Notary Public.

My Commission Expires Nov. 9, 1952.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Dana Lantham, Esquire, or Austin H. Peck,
Jr., Esquire, or Henry C. Diehl, Esquire, 1112
Title Guarantee Building, 411 West Fifth
Street, Los Angeles 13, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Service acknowledged.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Commissioner of Internal Revenue, petitioner on review herein, relies upon the following points in support of his position:

The Tax Court of the United States erred:

1. In holding and deciding that "back pay" received by the taxpayer in 1944 exceeded 15 percent of the taxpayer's gross income for this year.

2. In failing to hold and decide that the "back pay" received by the taxpayer in 1944 did not exceed 15 percent of the taxpayer's gross income for this year.

3. In holding and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46.

4. In failing to hold and decide that there is a deficiency for the year 1944 in the amount of \$3,086.48.

5. In that its opinion and decision are not supported by the evidence and are contrary to the law and regulations promulgated thereunder.

/s/ THERON L. CAUDLE,

Assistant Attorney General.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue. Attorneys for Petitioner on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the Tax Court of the United States:

Will you please prepare, certify, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, the following portions of the record before the Tax Court of the United States:

- (1) Petition.
- (2) Answer.
- (3) Findings of Fact and Opinion of the Tax Court.
- (4) Decision of the Tax Court.
- (5) Petition for review, together with proof of service and Statement of Points.
- (6) This designation.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Tax Court and Cause.]

CLERK'S CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 8, inclusive, constitute and are the original papers and proceeding on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before the Tax Court of the United States in the above-entitled proceeding and in which the respondent in The Tax Court proceeding has initiated an appeal as above-numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 12971. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Estate of R. L. Langer, Deceased, Eleanor Langer, Executrix, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed June 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12972

United States
Court of Appeals
for the Ninth Circuit

JAMES M. ALSUP, Individually, and as United
States Collector of Internal Revenue for the
District of Hawaii,

Appellant,

vs.

EMIL C. PETERS,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii.

No. 12972

United States
Court of Appeals
for the Ninth Circuit

JAMES M. ALSUP, Individually, and as United
States Collector of Internal Revenue for the
District of Hawaii,

Appellant,

vs.

EMIL C. PETERS,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	19
Appeal:	
Certificate of Clerk to Record on.....	118
Designation of Record to be Printed on (USCA)	120
Notice of	116
Statement of Points on (USCA).....	119
Stipulation as to Record on (DC).....	116
Certificate of Clerk to Record on Appeal.....	118
Complaint	3
Designation of Record to be Printed on Appeal (USCA)	120
Judgment	114
Names and Address of Attorneys.....	1
Notice of Appeal	116
Opinion of the Court.....	88
Statement by Appellant of Points to be Relied Upon on Appeal (USCA).....	119
Stipulation as to Record (DC).....	116

ii.

Stipulation of Facts.....	24
Exhibit 1(1)—Indenture of Trust dated May 28, 1935	28
Exhibit 1(2)—Gift Tax Return of Emil C. Peters for Calendar Year, 1935.....	40
Exhibit 1(3)—Gift Tax Return of M. Mapuana Peters for Calendar Year, 1935.....	42
Exhibit 1(4)—Indenture of Trust dated September 8, 1931	45
Exhibit 1(5)—Amendment of Indenture of Trust of Sept. 8, 1931, dated Dec. 31, 1943..	53
Exhibit 1(6)—Amendment of Indenture of Trust of May 28, 1935, dated Jan. 1, 1944..	59
Exhibit 1(7)—Amendment of Indenture of Trust of May 28, 1935, dated Oct. 25, 1944..	65
Exhibit 1(8)—Cancellation of Indenture of Trust of May 28, 1935, as amended, dated Oct. 26, 1944	70
Exhibit 1(9)—Gift Tax Return of Emil C. Peters for 1943	74
Exhibit 1(10)—Gift Tax Return of Emil C. Peters for 1944	76
Exhibit 1(11)—Letter of Emil C. Peters to Commissioner of Internal Revenue, dated March 7, 1945	80
Exhibit 1(12)—Notice of Deficiency of Gift Taxes for 1944, dated Sept. 17, 1947.....	81
Exhibit 1(13)—Treasury Decision No. 5366..	82

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff:

EMIL C. PETERS, Esq.,
309 Castle & Cooke Bldg.,
Honolulu 13, Hawaii.

For the Defendant:

UNITED STATES DISTRICT ATTORNEY,
District of Hawaii,
Federal Building,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil Action, File No. 935

EMIL C. PETERS,

Plaintiff,

vs.

JAMES M. ALSUP, Individually and as United
States Collector of Internal Revenue for the
District of Hawaii,

Defendant.

COMPLAINT

To the Honorable the United States District Court
for the District of Hawaii:

The abovenamed plaintiff complains of the above-
named defendant and for causes of action alleges:

First Cause of Action

1. That the grounds upon which the jurisdiction
depends are that the cause of action
herein alleged arises under a "law providing for in-
ternal revenue" and is for the recovery "of an in-
ternal revenue tax" allegedly "erroneously and
illegally assessed and collected".

2. That the plaintiff, hereinafter referred to as
the "taxpayer", is and during all the times herein-
after mentioned was a resident of Honolulu, City
and County of Honolulu, Territory of Hawaii, and
is a citizen of said Territory and of the United
States of America.

3. That the Honorable James M. Alsup, the defendant abovenamed, on, to wit, October 10, 1947, was and since has been and now is United States Collector of Internal Revenue for the District of Hawaii.

4. That on, to wit, May 28, 1935, the taxpayer and his wife, M. Mapuana Peters, since deceased, being then possessed of certain *person* property other than cash as tenants by the entirety made a transfer of the same by gift, in trust; that on, to wit, March 16, 1936, (the day preceding being Sunday) the taxpayer and his wife made separate returns of the transfer by gift so made by them during the calendar year 1935, by filing with the Collector of Internal Revenue for the District of Hawaii, in duplicate, under oath, separate gift tax returns for that year on Form 709; that in said returns the personal property comprising the gift was listed, and there was also set forth the fair market value for each item thereof; that included in said gift were 5,355 shares of the capital stock of Pineapple Holding Company, Limited, a Hawaiian corporation, the fair market value of the shares of stock of Pineapple Holding Company, Limited being set forth in said return at \$16.75 per share; that in said returns were also set forth the deductions claimed and allowable by law, the net gifts for the preceding calendar years, and such further information as required by law and by regulation made pursuant to law.

5. That on, to wit, March 15, 1944, the taxpayer filed with the Collector of Internal Revenue for the

District of Hawaii, in duplicate, under oath, a gift tax return of transfers by gift made by him during the calendar year 1943, on Form 709; that in said return the taxpayer set forth each gift made by him during the calendar year 1943, which, under Section 1003 of the Internal Revenue Code, should have been included in computing net gifts and deductions claimed and allowable under Section 1004, showing (a) the amount of the net gifts for the calendar year for which the return was prepared, (b) the aggregate sum of net gifts made after June 6, 1932, and each of the preceding calendar years, (c) the aggregate amount of the net gifts for the year for which the return was prepared plus the aggregate sum of net gifts for each of the preceding calendar years, (d) the tax computed upon (c), using the rate schedule in force for the calendar year for which the return was prepared, (e) the tax upon the aggregate amount of gifts for each of the preceding calendar years, as ascertained in (b), using the same rate schedule as used for the calendar year 1943, and (f) the total tax as finally ascertained for the calendar year 1943, as follows:

Total included amount of gifts for year.....	\$21,155.55
Amount of net gifts for year.....	21,155.55
Total amount of net gifts for preceding years....	13,196.37
Total net gifts.....	34,351.92
Tax on total net gifts.....	2,837.51
Tax on net gifts for preceding years.....	638.70
Total tax for 1943.....	2,198.81

6. That on, to wit, February 26, 1947, the Commissioner of Internal Revenue determined that a deficiency existed in the gift taxes returned and paid

by the taxpayer for the calendar year 1943 and advised the taxpayer thereof in writing and, no petition having been filed by the taxpayer with the Tax Court of the United States for a redetermination of the alleged deficiency in the amount of the tax returned and paid by the taxpayer upon transfers of property made by him by gift during the calendar year 1943, assessed against the taxpayer a deficiency in gift taxes for the calendar year 1943 of \$52.71; that the basis of such determination and assessment of deficiency as alleged by the Commissioner of Internal Revenue was that the taxpayer, in his return of gifts made by him during the calendar year 1935, had set forth the fair market value at the date of the gift of shares of stock of Pineapple Holding Company, Limited, at \$16.75 per share; that the Collector of Internal Revenue had found that the fair market value of said shares of stock of Pineapple Holding Company, Limited, on the date of gift, was \$17.125 per share; and that the net gifts of preceding years, as reported by the taxpayer in his return for the calendar year 1943, should have been increased by \$1,004.07 the deficiency in the 1935 return on the one-half interest of the taxpayer in 5,355 shares of stock of Pineapple Holding Company, Limited, and the Collector of Internal Revenue determined the said deficiency as follows:

Total gifts 1943.....	\$33,155.55
Less exclusions	12,000.00
Amount, gifts included.....	21,155.55
Net gifts for 1943	21,155.55
Total net gifts for preceding years:	
1933	1,459.50
1935	12,740.94

Total net gifts	35,355.59
Tax on total net gifts.....	2,973.06
Less tax on net gifts for preceding years.....	721.54
Total tax payable for 1943.....	2,251.52
Total tax assessed	2,198.81
Deficiency	52.71

7. That on, to wit, October 10, 1947, the taxpayer paid to the Collector of Internal Revenue for the District of Hawaii said alleged deficiency of \$52.71, together with interest as required and imposed by law in the sum of \$10.89.

8. That until examination was made in the year 1947 of the taxpayer's gift return for the calendar year 1943 the taxpayer was not advised of any audit of the taxpayer's gift tax return for the calendar year 1935 or of any adjustment or proposed adjustment in the figures reported in said gift tax return for the calendar year 1935; that the taxpayer was never given an opportunity in connection with said gift tax return for the calendar year 1935 to present the position of the taxpayer with respect to the value of shares of the capital stock of Pineapple Holding Company, Limited on May 28, 1935 or to protest or to otherwise resist any increase in the value of said shares for the purpose of the computation of gift tax liability; that the time within which the gift taxes imposed by law upon gifts made by the taxpayer during the calendar year 1935 should have been assessed was, under the provisions of Section 1016 of the Internal Revenue Code, the three years next preceding March 17, 1939; that the fair market value of shares of stock of the Pineapple Holding Company, Limited, on May 28, 1935, the time that the gift was made by the taxpayer in the calendar

year 1935, was a question of fact and not one of law; that for the purpose of computing gift tax liability factual issues involved in determining the value of personal property included in the amount of net gifts of previous years are barred from re-examination by the provisions of Section 1016 of the Internal Revenue Code; and the re-assessment of the gift tax liability of the taxpayer in 1944 for gifts made by him during the calendar year 1935 is illegal and contrary to law.

9. That if the statute is not a bar and under the provisions of the Revenue Code and Treasury Regulations the determination of the aggregate net gift of previous years admits of new findings upon questions of fact, the taxpayer alleges that the fair market value of stock of the Pineapple Holding Company, Limited, on May 28, 1935, was the sum of \$16.75 per share, and a deficiency assessed upon the basis of a fair market value in excess of that amount is illegal and contrary to law.

10. That on, to wit, October 28, 1948, the taxpayer filed with the Collector of Internal Revenue for the District of Hawaii a claim, addressed to the Commissioner of Internal Revenue, for refund of the sum of \$52.71 deficiency gift taxes so paid by him for the calendar year 1943 and interest thereon in the sum of \$10.89, on Form 843, setting forth in detail and under oath each ground upon which a refund was claimed and facts sufficient to apprise the Commissioner of the exact basis thereof; and under date of February 8, 1949, the Commissioner of Internal Revenue disallowed the same.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$63.60, with interest from date of payment.

Second Cause of Action

And for a second and separate and distinct cause of action by plaintiff against defendant, plaintiff alleges:

1. Plaintiff realleges all the allegations in paragraphs 1, 2, 3, 4, 5 and 6 in his first cause of action herein alleged.

2. That on September 8, 1931, at Honolulu, Hawaii, the taxpayer and M. Mapuana Peters, his wife, since deceased, created three express trusts in writing, as joint settlors, for the benefit of each of their three children, by name, Mapuana Smith McComas, nee Peters, Emil C. Peters, Jr., and Elza H. Steiner, nee Peters, by conveying by three separate indentures of trust of even date certain personal property of which they were owners as tenants by the entirety to Hawaiian Trust Company, Limited, a Hawaiian corporation, as trustee; that the three separate indentures of trust were identical in form except as to the name of the beneficiary and the personal property conveyed; that the trustee was thereby directed to pay the net rents, profits and income of the trust estate to the beneficiary for and during the term of his or her natural life with the right of invasion of the principal at the discretion of the trustee in the event of serious illness of or other unforeseen emergency to the beneficiary; that the settlors reserved to themselves and the survivor

of them the right from time to time to change, modify or amend the provisions of the trust but not to revoke the same or to so change it that they or either of them would receive back any of the trust estate or any of the income therefrom.

3. That on January 8, 1942, M. Mapuana Peters, the wife of the taxpayer, died.

4. That on, to wit, December 31, 1943, the taxpayer, as surviving settlor, amended the three indentures of trust of September 8, 1931, by (a) enlarging the powers of the trustee in its discretion to invade the principal, (b) by irrevocably relinquishing and extinguishing the right of the taxpayer, as surviving settlor, to shift or to effect a partial or complete alteration of the income benefits of the trust created by said indentures, and (c) by relinquishing the power of amendment reserved therein; that the three indentures of trust of September 8, 1931, as amended, were identical in form except as to the name of the beneficiary and the personal property subject thereto.

5. That on, to wit, May 28, 1935, at said Honolulu, the taxpayer and his wife, M. Mapuana Peters, since deceased, as aforesaid, created an express trust, in writing, of personal property of which they were possessed as tenants by the entirety, by conveying the same to the Hawaiian Trust Company, Limited, as trustee, upon the following trusts, among others: (a) to pay the net income to the wife for and during the term of her natural life and portions of the principal of the trust estate if and whenever the trustee should in its discretion consider the remain-

ing net income insufficient for her suitable support and maintenance, and, if at any time or times on account of accident, illness, age, infirmities or unforeseen emergency the wife should require the expenditure upon her or for her benefit of the principal, to spend for such purpose such an amount as the trustee might deem reasonably necessary under the circumstances, (b) upon and after the death of the wife, to pay the remaining net income to the taxpayer, if he be then living, for and during the remainder of his natural life, with the right of the trustee to invade the principal similarly as in the case of the wife, and (c) upon the death of the survivor of the settlors, to distribute the remaining trust principal and any unapplied income therefrom to the person or persons and for the respective estates as the survivor of the settlors should, in his or her last will and testament, direct, and, in default of such direction or in the event of the survivor dying intestate, to distribute the same in three aliquot parts to the three existing trusts of September 8, 1931; that by the indenture of trust of May 28, 1935, the settlors reserved to themselves and the survivor of them the right from time to time to change, modify or amend the provisions of the trust but not to revoke the same or to change it so that they or either of them should receive back any of the trust estate; that it was the intention of the settlors, by the qualification attached to their power to change, modify or amend the provisions of the trust, that the inhibition against revocation or receiving back any of the trust estate included both themselves and the survivor of them

and their respective creditors and estates; that at the time of the transfer of said personal property in trust the same was pledged to secure the personal indebtedness of the taxpayer in the sum of Nineteen Thousand Four Hundred Forty (19,440.00) Dollars, and such indebtedness was thereafter paid and discharged by the taxpayer individually from his own moneys, Fourteen Thousand Four Hundred (14,400.00) Dollars of which were paid by the taxpayer in the calendar year 1943 and upon which he paid gift taxes.

6. That in the gift tax return made separately by the taxpayer for the calendar year 1935, as alleged in paragraph 3 of the taxpayer's first cause of action, he reported, in Item C, Schedule A, thereof, a gift of a one-half interest in the personal property conveyed by him as joint settlor by the trust indenture dated May 28, 1935, of the fair market value of \$112,913.75, subject to an indebtedness of \$19,440.00, and of a net value of \$93,473.75, and of a net value to the taxpayer of \$46,736.87; and that he therein computed the amount of net gifts for the year and his gift tax liability as follows:

(1) Amount of gifts for year other than charitable, etc. gifts (Item C, Schedule A).....	\$41,736.87
(2) Amount of charitable, public and similar gifts for year (Item C, Schedule B).....	None
(3) Total amount of gifts for year (Item 1 plus Item 2)	41,736.87
(4) Amount of charitable, public and similar gifts for year (Item C, Schedule B).....	None
(5) Specific exemption claimed (not exceeding \$50,000 less total amount of specific exemption claimed for preceding years)	41,736.87
(6) Total deduction (Item 4 plus Item 5).....	41,736.87
(7) Amount of net gifts for year (Item 3 minus Item 6)	None

that the wife of the taxpayer, in her separate return of gifts made by her during the calendar year 1935, reported a gift of an undivided one-half interest in the same property, similarly as the taxpayer, of a net value of \$46,736.87, and took a deduction for the present value of her life interest in the income from an undivided one-half of the property conveyed in the sum of \$19,366.42, reporting the net value of the property transferred by her at \$27,370.45; and that she reported the amount of gifts for the calendar year 1935, other than charitable, etc., at \$41,736.87 and claimed a specific exemption in that amount.

7. That on January 1, 1944, the taxpayer, as surviving settlor, amended the provisions of the trust indenture of May 28, 1935, by incorporating therein instructions to the Hawaiian Trust Company, Limited, as trustee, to transfer and deliver to itself, as of the 1st day of January, 1944, in its respective capacities as trustee of the three subsisting trusts of September 8, 1931, all of the property except cash of which the trust of May 28, 1935, was then composed, identifying the same accordingly as it should stand possessed, as trustee, of each beneficiary of said trusts of September 8, 1931; that on October 25, 1944, the taxpayer, as such surviving settlor, further amended the provisions of the trust indenture of May 28, 1935, as amended, by incorporating therein instructions to the Hawaiian Trust Company, Limited, as trustee, to pay, as of that date, to itself, in its capacity of trustee respectively for the three children of the surviving settlor, the cash

money remaining included in the trust estate of May 28, 1935, as amended, to wit, the sum of \$484.53, and to stand possessed of a one-third part thereof as trustee respectively for the beneficiaries under said indentures of trust of September 8, 1931; that the trustee conformed forthwith to the respective instructions incorporated by amendment in the trust indenture of May 28, 1935, by the amendments of January 1 and October 25, 1944, respectively, and thereupon and thereafter held and has held and possessed the property subject to said amendments, as trustee of the three trusts of September 8, 1931, as amended; that on October 26, 1944, the trust of May 28, 1935, as amended, was cancelled by mutual consent of the taxpayer, as surviving settlor, and the Hawaiian Trust Company, Limited, as trustee.

8. That on to wit, March 15, 1945, the taxpayer filed with the Collector of Internal Revenue for the District of Hawaii a gift tax return of transfers by gift made by him during the calendar year 1944, on Form 709, in duplicate, under oath; that the taxpayer, in Schedule A, reported the relinquishment by him in 1944 "of certain powers and control with respect to the property and income of a 'Discretionary Trust' created prior to January 1, 1939 (i.e., May 28, 1935) by the taxpayer and his wife now deceased", claimed "that said relinquishment was nontaxable, in conformity with the provisions of Section 1000(e) [1000 (3)] of the Internal Revenue Code, in view of the fact that the transfer in trust under the indenture of May 28, 1935, was treated as a taxable gift and gift tax returns were duly filed

for the calendar year 1935'', and advised that "full details regarding the aforesaid relinquishment together with taxpayer's written consent to treat said transfer of May 28, 1935, as a taxable transfer for the year 1935 and for all periods thereafter, as required by Section 1000(e) [Section 1000(3)] of the Internal Revenue Code'', were "contained in taxpayer's letter, together with accompanying documents attached and made a part of his return''; that at the same time and as a part of said return, under date of March 7, 1945, the taxpayer advised the Commissioner of Internal Revenue, by letter, that, as surviving settlor and grantor in the trust indenture of May 28, 1935, he had, by indentures dated December 31, 1943, January 1, 1944, October 25, 1944, and October 26, 1944, full, true and correct copies of which were attached and made a part thereof, relinquished all power and control with respect to the distribution of the property and income of and from the trust of May 28, 1935, and had exercised and terminated such power and control in the manner therein recited, and that, pursuant to the provisions of Sections 502 and 505 of the Revenue Act of 1943 and Regulation 108, as amended (T.D. 5366), he thereby consented, for all purposes of the chapter of the Revenue Code of 1943 applicable thereto, to treat such relinquishment in the calendar year in which the transfer was effected, to wit, the year 1935, and for all periods thereafter as having been a transfer of property subject to tax under the applicable chapter of the Revenue Code effective May 28, 1935, and since, and prayed that, in

the absence of existing regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury prescribing the form of consent, the within consent be accepted as conformable to Regulation 108, as amended; that neither at the time of so consenting nor prior thereto had the Commissioner of Internal Revenue prescribed with the approval of the Secretary of Treasury regulations in respect to such consent; that the consent so given by the taxpayer was accepted by the Commissioner of Internal Revenue as conformable to Regulation 108, as amended.

9. That on, to wit, September 17, 1947, the Commissioner of Internal Revenue determined that a deficiency existed in the gift taxes returned by the taxpayer for the calendar year 1944 and advised the taxpayer thereof and, no petition having been filed by the taxpayer with the Tax Court of the United States for a redetermination of the alleged deficiency, the Commissioner assessed against the taxpayer a deficiency in his gift tax liability for the calendar year 1944 in the sum of \$7,908.37; that the basis of such determination and assessment of deficiency as alleged by the Commissioner of Internal Revenue was that the taxpayer, in his return of gifts made by him during the calendar year 1944, set forth no tax liability; that the Collector of Internal Revenue found that the taxpayer, in the calendar year 1944 had, by the indentures of amendment of January 1, 1944 and October 25, 1944, exercised a power of appointment over the property transferred by the deceased wife of the taxpayer to the trust created

by the trust indenture of May 28, 1935; and that he determined and assessed the deficiency of the taxpayer in his gift tax liability for gifts made by him during the calendar year 1944 as follows:

Amount of gifts 1944.....	\$51,531.77
Amount of net gifts preceding years.....	35,355.99
Total amount of net gifts.....	86,887.76
Less exclusions	9,000.00
Total net gifts.....	77,887.76
Less specific exemption	None
Total net gifts for tax.....	77,887.76
Tax on total net gifts.....	10,881.43
Tax on net gifts for preceding years.....	2,973.06
Deficiency	7,908.37;

That included in the "Total amount of net gifts of preceding years" of \$13,196.37 reported by the taxpayer for the year 1943, as set forth in paragraph 5 of the first cause of action hereof, is a gift by the taxpayer in the calendar year 1933 of \$1,459.50; that the date of birth of the taxpayer is December 15, 1877; that the present worth at the date of gift of the equitable life estate of the taxpayer in one-half of the income to accrue under the trust of May 28, 1935 was the sum of \$19,336.42; and that the consent of March 7, 1947, alleged in paragraph 8 of this second cause of action, was given by the taxpayer in good faith and in reliance upon the provisions of sections 502 and 505 of the Revenue Act of 1943 and the amendment of Regulation 108 approved May 5, 1944 (T. D. 5366) and in the belief that the relinquishment by the taxpayer of the reserved power of amendment reposed in him as surviving settlor and grantor, by the exercise thereof as herebefore alleged, constituted, under the provisions

of said sections of the Revenue Act of 1943 and said regulation 108 as amended as aforesaid, a tax exempt exercise of a power of appointment of all the property then remaining in the trust created by the trust indenture of May 28, 1935.

10. That on, to wit, October 10, 1947, the taxpayer paid to the Collector of Internal Revenue for the District of Hawaii the amount of said deficiency in gift taxes for the year 1944 as thus determined and assessed, in the sum of \$7,908.37, together with interest as required and imposed by law in the sum of \$1,259.59.

11. That on, to wit, October 28, 1948, the taxpayer filed with the Collector of Internal Revenue for the District of Hawaii a claim addressed to the Commissioner of Internal Revenue for refund of taxes for the calendar year 1944 in the sum of \$7,908.37 and interest in the sum of \$1,259.59, on Form 843, setting forth in detail and under oath each ground upon which a refund was claimed and facts sufficient to apprise the Commissioner of the exact basis thereof; and under date of February 2, 1949, the Commissioner of Internal Revenue disallowed the same.

12. That the assessment of the deficiency for the year 1944 was and is illegal and contrary to law.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$9,167.96 with interest from October 10, 1947.

Dated: September 6, 1949.

/s/ EMIL C. PETERS,

Plaintiff in person.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

ANSWER

James M. Alsup, Collector of Internal Revenue for the District of Hawaii, the defendant above-named, by Ray J. O'Brien, United States Attorney for the District of Hawaii, his attorney, for his answer to the complaint herein respectfully alleges and shows:

To the First Cause of Action

I.

Admits each and every allegation contained in paragraph 1.

II.

Admits each and every allegation contained in paragraph 2.

III.

Admits each and every allegation contained in paragraph 3.

IV.

Denies each and every allegation contained in paragraph 4, except he admits that on or about May 28, 1935, the plaintiff and his wife made a transfer of certain property by gift in trust; for the terms of which defendant refers to the trust instrument; that on March 16, 1936, the plaintiff and his wife filed separate gift tax returns for the calendar year 1935, to which said returns defendant refers for the matters set forth therein.

V.

Denies each and every allegation contained in paragraph 5, except he admits that on March 15, 1944, the plaintiff filed with the Collector of Internal Revenue for the District of Hawaii, a gift tax return of the transfers of gifts made by him during the calendar year 1943, to which said return defendant refers for the matters set forth therein.

VI.

Admits each and every allegation contained in paragraph 6.

VII.

Admits each and every allegation contained in paragraph 7.

VIII.

Denies each and every allegation contained in paragraph 8, except he admits that until examination was made in 1947 of the plaintiff's gift tax return for the calendar year 1943, the plaintiff was not advised of any audit of his gift tax return for the calendar year 1935 or of any adjustment or proposed adjustment of the figures reported in the said gift tax return for the calendar year 1935.

IX.

Denies each and every allegation contained in paragraph 9.

X.

Denies each and every allegation contained in

paragraph 10, except he admits that on October 28, 1948, the plaintiff filed with the defendant a claim for refund of the sum of \$52.71, with interest in the sum of \$10.89.

To the Second Cause of Action

I.

Defendant, answering paragraph 1 of the second cause of action, repeats and realleges paragraphs 1, 2, 3, 4, 5 and 6 of this answer.

II.

Denies each and every allegation contained in paragraph 2, except he admits that on September 8, 1931, plaintiff and his wife created three express trusts in writing for the terms of which defendant refers to the originals thereof.

III.

Admits each and every allegation contained in paragraph 3.

IV.

Denies each and every allegation contained in paragraph 4, except he admits that on December 31, 1943, the taxpayer amended the three indentures of trust dated September 8, 1931; for the terms of these amendments defendant refers to the instruments amending them.

V.

Denies each and every allegation contained in paragraph 5, except he admits that on May 28, 1935,

the plaintiff and his wife created an express trust in writing for the terms of which defendant refers to the original trust instrument.

VI.

Denies each and every allegation contained in paragraph 6, except he admits that plaintiff filed a gift tax return for the calendar year 1935, to which defendant refers for the contents thereof; and that the plaintiff's wife filed a separate gift tax return for the calendar year 1935, to which defendant refers for the contents thereof.

VII.

Admits each and every allegation contained in paragraph 7.

VIII.

Denies each and every allegation contained in paragraph 8, except he admits that on March 15, 1945, the plaintiff filed with the Collector of Internal Revenue for the District of Hawaii, a gift tax return for the calendar year 1944, to which the defendant refers for the contents thereof.

IX.

Denies each and every allegation contained in paragraph 9, except he admits that on September 17, 1947, the Commissioner of Internal Revenue determined a deficiency in plaintiff's gift taxes for the calendar year 1944 in the sum of \$7,908.37 which was subsequently assessed against the plaintiff; that the basis of the Commissioner's determination was

that the plaintiff by the indentures of amendment of January 1, 1944, and October 25, 1944, had exercised a power of appointment over the property transferred by plaintiff's wife to the trust created by the trust indenture of May 8, 1935.

X.

Admits each and every allegation contained in paragraph 10.

XI.

Denies each and every allegation contained in paragraph 11, except he admits that on October 28, 1948, plaintiff filed with the Collector of Internal Revenue for the District of Hawaii, a claim for refund for the sum of \$7,908.37 and interest in the sum of \$1,259.59, to which defendant refers for the contents thereof.

XII.

Denies each and every allegation contained in paragraph 12.

Wherefore, defendant demands judgment dismissing the complaint with costs.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

/s/ By HOWARD K. HODDICK,
Assistant United States Atty.,
District of Hawaii.

Acknowledgment of Service attached.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the plaintiff in person and the defendant by his attorney, Ray J. O'Brien, United States Attorney for the District of Hawaii, as follows:

1. That the attached photostats of the following enumerated papers and documents identified in subparagraphs (1) to (13), both inclusive hereof, may be admitted in evidence and considered in evidence to the same legal force and effect as the respective originals of said papers and documents, viz.:

(1) Indenture of trust of Plaintiff and wife to Hawaiian Trust Company Ltd., dated May 28, 1935.

(2) Gift tax return of Plaintiff for the calendar year, 1935.

(3) Gift tax return of M. Mapuana Peters, wife of plaintiff for the calendar year, 1935.

(4) Indenture of trust of plaintiff and wife to Hawaiian Trust Company Ltd., of which Mapuana, the daughter of the settlors, is the life beneficiary, dated September 8, 1931.

(5) Amendment of indenture of trust in the last preceding paragraph described, dated December 31, 1943.

(6) Amendment of indenture of trust of May 28, 1935, dated January 1, 1944.

(7) Amendment of indenture of trust of May 28, 1935, as amended, dated October 25, 1944.

(8) Cancellation of indenture of trust of May 28, 1935, as amended, dated October 26, 1944.

(9) Gift tax return of plaintiff for the calendar year 1943.

(10) Gift tax return of plaintiff for the calendar year 1944.

(11) Letter of plaintiff to Commissioner of Internal Revenue, dated March 7, 1945.

(12) Notice of deficiency of gift taxes of plaintiff for the calendar year 1944, dated September 17, 1947.

(13) Treasury Decision No. 5366.

2. They admit:

(1) That on September 20, 1904, and since and until January 8, 1942, plaintiff and M. Mapuana Peters were husband and wife.

(2) That as issue of the marriage of plaintiff and his wife, M. Mapuana Peters, there are three children, by name and date of birth as follows:

Mapuana S.—Born July 5, 1905

Emil C. Jr.—Born Nov. 3, 1906

Elsa H.—Born Dec. 4, 1907.

(3) That all the certificates of stock evidencing the ownership of the corporate stock conveyed in trust by the trust indenture of May 28, 1935, were on that day and thereafter until transferred into the name of Hawaiian Trust Company, Ltd., Trustee in the name of "M. Mapuana Peters and E. C. Peters as joint tenants with right of survivorship and not as tenants in common."

(4) That the three indentures of trust of September 8, 1931, as originally executed and as subse-

quently amended on December 31, 1943, were and are identical in form, and the same respectively as exhibits 1 (4) and 1 (5) identified in paragraph 1, subparagraphs (4) and (5) hereof, except as to the name of the life beneficiary and the personal property subject thereto.

(5) That at the time of the transfer on May 28, 1935, of said personal property in trust a part of the same was pledged to secure the personal indebtedness of the plaintiff in the sum of (\$19,440.00) Nineteen Thousand, Four Hundred Forty Dollars, and such indebtedness was thereafter paid by plaintiff individually from his own moneys, Fourteen Thousand, Four Hundred Dollars (\$14,400.00) of which were paid by plaintiff in the calendar year 1943 and upon which he paid gift taxes.

(6) That the letter of plaintiff to the Commissioner of Internal Revenue dated March 7, 1945, identified in paragraph 1, subparagraph (10) hereof was on, to-wit, March 7, 1945, mailed by plaintiff to the Commissioner of Internal Revenue by U. S. Registered Mail addressed to him at Washington, D. C., and the Commissioner of Internal Revenue never made any reply thereto.

(7) That the date of birth of the taxpayer is December 15, 1877.

(8) That the present worth at the date of gift of the equitable life estate of the taxpayer in one-half of the income to accrue under the trust of May 28, 1935, was the sum of Nineteen Thousand, Three

Hundred Thirty-Six Dollars and Forty-two cents (\$19,336.42).

(9) That on May 28, 1935, the highest and lowest quoted selling prices of shares of the Pineapple Holding Company, Ltd., on the Honolulu Stock Exchange were \$17.50 and \$16.75 per share respectively.

3. That the plaintiff if called as a witness on his own behalf would testify:

(1) That the personal property transferred by the indenture of trust of May 28, 1935, originally belonged to the plaintiff, and the consideration with which the same was acquired by him was provided by plaintiff out of his own monies and properties, and plaintiff's wife did not contribute thereto either in whole and in part.

4. That the within stipulation in order to its effectiveness be approved by a judge of the above named court.

Dated: May 25, 1950.

/s/ EMIL C. PETERS,
Plaintiff in Person.

Dated: October 5, 1950.

/s/ RAY J. O'BRIEN,
U. S. Attorney for the District
of Hawaii.

Approved:

/s/ D. E. METZGER,
Judge United States District Court for the District
of Hawaii.

EXHIBIT No. 1 (1)

This Agreement made this 28th day of May, 1935 by and between Emil Cornelius Peters and Mary Mapuana Peters, husband and wife, of Honolulu, Hawaii, parties of the first part, hereinafter called the "Settlers" and Hawaiian Trust Company, Limited, an Hawaiian corporation, having its principal office in said Honolulu, part of the second part, hereinafter called the "Trustee", which expression shall be deemed to include all successors in trust hereunder;

Witnesseth

That the Settlers in consideration of the premises and the terms, covenants and conditions herein expressed on the part of the Trustee to be observed and performed, do hereby grant, assign, transfer, set over and deliver unto said Hawaiian Trust Company, Limited in its capacity of Trustee hereunder, all of the following property, to-wit:

Three Thousand (3000) shares of the capital stock of Pineapple Holding Company, Limited, evidenced by Certificate No. H-3806; Fifty (50) shares Hawaiian Trust Company, Limited, evidenced by Certificate No. 777; Six Hundred and Five (605) shares Hawaiian Pineapple Holding Company, Limited, evidenced by Certificate No. H-2285; One Thousand Seven Hundred and Fifty (1750) shares Pineapple Holding Company, Limited, evidenced by Certificate No. H-2283; One Hundred Fifty (150) shares of the capital stock of Bishop National Bank of Hawaii, at Honolulu, evidenced by Certificate No. 530; Two Hundred Fifteen (215) shares of the capital stock

Exhibit No. 1 (1)—(Continued)

of the Bishop Trust Company, Limited, evidenced by Certificates Nos. B-1198 for Fifteen (15) shares, B1196 for One Hundred (100) shares and B1197 for One Hundred (100) shares; Twenty-five (25) shares of the capital stock of the Bank of Hawaii, Limited, evidenced by Certificate No. B164; Twenty-five (25) shares of the capital stock of the Hawaiian Agricultural Company, Limited, evidenced by Certificates Nos. 1036 for Twenty (20) shares and 1037 for Five (5) shares; Five (5) shares of the capital stock of the Inter-Island Steam Navigation Company, Limited, evidenced by Certificate No. 4171, Fifty (50) shares of the Pepeekeo Sugar Company, evidenced by Certificates Nos. 373; Five (5) shares of the Waianae Company, evidenced by Certificate No. 560.

To have and to hold the same and all proceeds thereof and all property whatsoever in which the same or any part thereof may at any time or times be resolved by investment, reinvestment, exchange, or otherwise unto the said Trustee and its successors in trust hereunder, subject to the terms, conditions, charges and powers hereinafter mentioned and upon the following uses and trusts, namely:

1. To hold and manage the trust estate and to receive the rents, profits and income thereof and to pay from said property and from said rents, profits and income, all expenses and disbursements properly chargeable thereto respectively, and to deal with and dispose of the remaining rents, profits and income in the manner and for the uses and purposes hereinafter set forth.

Exhibit No. 1 (1)—(Continued)

2. To pay the remaining net rents, profits and income to the Settlor, Mary Mapuana Peters for and during the term of her natural life in monthly payments as nearly equal in amount, as may in the discretion of the Trustee be practicable, and also portions of the principal of the trust estate, if and whenever it shall in its discretion consider the remaining net rents, profits and income insufficient for her suitable support and maintenance. If at any time or times on account of accident, illness, age, infirmities or unforeseen emergency, the said Settlor, Mary Mapuana Peters, shall require the expenditure upon her or for her benefit of principal hereof, said Trustee is hereby authorized to appropriate and expend for such purposes such an amount as it may deem reasonably necessary under the circumstances.

3. The income herein directed to be paid to the said Settlor, Mary Mapuana Peters, shall be made personally to her or upon her order in receipt in writing, that is, free from the interference or control of her creditors and never by way of anticipation or assignment, voluntary or involuntary.

4. Upon and after the death of the Settlor, Mary Mapuana Peters, to pay the remaining net rents, profits and income, to the Settlor, Emil Cornelius Peters, if he be then living, for and during the remainder of his natural life, in monthly payments as nearly equal in amount, as may in the discretion of the Trustee be practicable, and also portions of the principal of the trust estate, if and whenever it shall

Exhibit No. 1 (1)—(Continued)

in its discretion consider the remaining net rents, profits and income insufficient for his suitable support and maintenance. If at any time or times on account of accident, illness, age, infirmities or unforeseen emergency, the said Settlor, Emil Cornelius Peters, shall require the expenditure upon him or for his benefit of principal hereof, said Trustee is hereby authorized to appropriate and expend for such purposes such an amount as it may deem reasonably necessary under the circumstances.

5. The income herein directed to be paid to the said Settlor, Emil Cornelius Peters shall be made personally to him or upon his order or receipt in writing, that is, free from the interference or control of his creditors and never by way of anticipation or assignment, voluntary or involuntary.

6. The Settlers hereby expecially reserve unto themselves and the survivor of them, the rights:

(a) from time to time to change, modify or amend the provisions of this trust instrument, but not to revoke the same or to change it, that they or either of them, will receive back any of the trust estate;

(b) by written instrument, to change the Trustee under this instrument, whether named or appointed by virtue of this instrument or otherwise, and to appoint a new Trustee in the place and stead of the Trustee so relieved; and

(c) to appoint a successor trustee to fill any vacancy which may occur in the office of Trustee. Upon

Exhibit No. 1 (1)—(Continued)

every appointment of a new Trustee the trust property and all interest therein shall immediately become vested in the new Trustee, and every such new Trustee shall thereupon have all the powers, authority and discretion to perform the trust of these presents as though originally named in this instrument, and without necessity of any conveyance to it, him or her by the retiring Trustee, if any.

7. The Settlers further reserve unto themselves and the survivor of them the right at any time to grant, deliver, assign and set over and by last will and testament to devise and bequeath to said Trustee, for the purpose and upon the trusts hereof, other and additional property, real, personal and/or mixed, and the same shall upon grant, delivery or assignment to the Trustee or upon being vested in or distributed to it, become subject to all the conditions or terms of this indenture of trust in like manner and to the same effect as though the same were now included herein.

8. The Trustee shall have the following powers in addition to those otherwise expressly or by necessary implication, to it, herein granted:

(a) To hold, possess, manage, control, sell, transfer, convey, assign, convert, mortgage, pledge, lease, invest and reinvest in such property real and personal, tangible and intangible including the capital stock of local and foreign private corporations, as it may approve and otherwise deal with the whole and every part of the property which shall, from time to time, constitute the trust estate hereunder

Exhibit No. 1 (1)—(Continued)

according to its sole judgment and discretion, in every way as if the Trustee were the absolute owner thereof for its own benefit and without any limitation upon its power and authority so to do either by statute or otherwise; provided, however, that while and so long as the Settlor Emil Cornelius Peters shall live and be sui juris, no sale or exchange of the whole or any part of the trust property, nor investments, nor reinvestments of the same, shall be made by the Trustee without the prior written approval and consent of the Settlor, Emil Cornelius Peters.

(b) Specifically, but without limitation of the generality of the foregoing power and authority, the Trustee in its sole judgment and discretion subject to such approval and consent of the Settlor Emil Cornelius Peters, may: (1) sell all or any part of the property at any time included in the trust estate, at public auction or at private sale, for cash or credit, or partly for cash and partly for credit, upon such terms and/or conditions as it may approve. (2) Lease all or any part of the real property included in the trust estate with or without option to purchase, and for a period or periods which may extend beyond the termination of the trust, and (3) execute and deliver all deeds, leases and other instruments incidental to the performance of its powers hereunder.

The Trustee, may in its discretion settle, adjust and compromise any claims which may be made upon, or which may be asserted by or on behalf of,

Exhibit No. 1 (1)—(Continued)

said trust estate or any property included therein.

No person or corporation buying from or otherwise dealing with the Trustee shall be under any obligation to see to the application of any purchase money or other consideration received, or to the authority of the Trustee.

9. It shall be the duty of the Trustee:

(a) To keep all buildings and improvements in good order, condition and repair;

(b) To pay and discharge all taxes, rates and assessments of every kind and discription that may be levied and assessed upon or may become payable in respect of the trust estate or any part thereof or the respective interests of any beneficiary therein;

(c) To pay and discharge the reasonable costs and expenses incident to the administration of the trust hereby created including its commission;

(d) To render to the Settlers or the survivor of them quarterly a statement showing receipts and disbursements made in pursuance hereof during the accounting period and to render to the Settlers of the survivor of them annually an inventory of principal and income on hand at the concluding day of the year. The terms "quarterly" and "annually" refer to the calendar year. The Trustee shall not be under any obligation to file any account in any court or tribunal whatsoever. Nor shall it be required to give any bond as Trustee; and

(e) Upon the request of the Settlers, or the survivor of them, to resign as Trustee hereunder.

10. Upon the death of the survivor of the Settlers,

Exhibit No. 1 (1)—(Continued)

the Trustee shall distribute the remaining trust principal subject hereto, and any unapplied income therefrom, to the person or persons and for the respective estates as the survivor of the Settlers shall in his or her last Will and Testament direct, and in default of such direction or in the event of the survivor of the Settlers dying intestate, the Trustee shall distribute the same or cause the same to be distributed to the Hawaiian Trust Company, Limited or its successor in trust, and the said Hawaiian Trust Company, Limited or its successor in trust shall thereupon and thereafter stand seized and possessed of a one-third ($1/3$) part, share or interest therein in severalty, as Trustee under the terms and provisions of and upon the uses and trusts expressed in the certain indenture of trust made between the Settlers and the said Trustee, dated September 8, 1931, in which Mapuana Smith McComas, nee Peters, is beneficiary; a one-third ($1/3$) part, share or interest therein in severalty as Trustee under the terms and provisions of and upon the uses and trusts expressed in the certain indenture of trust made between the Settlers and the said Trustee, dated September 8, 1931, in which Emil Cornelius Peters, Junior, is the beneficiary; and the remaining one-third ($1/3$) part, share or interest therein in severalty as trustee under the terms and provisions of and upon the uses and trusts expressed in the certain indenture of trust made between the Settlers and the said Trustee, dated September 8, 1931, in which Elsa Hildebrandt Peters is the beneficiary.

Exhibit No. 1 (1)—(Continued)

11. The Trustee shall consider and treat all stock dividends and rights to subscribe received by it as principal and not as income; it shall consider and treat all cash dividends, whether regular or extraordinary, unless paid out of capital, as income and not as principal; it shall charge all premiums on investments against principal and shall credit all discounts on investments to principal; and it shall have full power of determining the proportion and mode in which special assessments and taxes for street improvements and other special purposes shall be borne as between principal and income, and every such determination shall be conclusive on all parties interested.

12. In any case in which the Trustee is required to divide the principal of said trust estate into parts or shares and to distribute all or any thereof, it is authorized and empowered in its sole discretion to make division or distribution in kind or partly in kind and partly in money and to distribute to any distributee property similar to or different from that distributed to any other distributee. The judgment of the Trustee concerning the values for the purpose of such division and distribution of the items of property in said trust estate shall be binding and conclusive on all parties interested. In any case in which the Trustee is required to divide the principal of said trust estate into parts or shares and to distribute any or all thereof, the term "principal" shall be deemed to include any and all unpaid income and accumulations.

Exhibit No. 1 (1)—(Continued)

13. The beneficiaries of said trust estate shall be without power of disposition or anticipation in any manner of any income or principal payable to them respectively prior to the actual receipt of the same and shall have no right or power to use their interests in said income or principal as collateral security or to pledge or mortgage the same in any manner. Said income and principal and their respective interests therein shall not be liable for any debt of theirs or be subject to judgment against them or to garnishment, attachment, execution or other legal process in aid or execution of any judgment or claim against them respectively.

14. The Trustee shall receive as compensation for its service hereunder five per cent (5%) on the gross income derived from said trust estate and also two and one-half per cent (2½ %) on the principal of said trust estate on the final payment of the same, either in cash or in kind, and either in whole or in part, at the termination of the trust or at any prior time. In the event of distribution to Hawaiian Trust Company, Limited as Trustee, to stand seized and possessed of equal one-third (1/3) parts, shares or interests in the trust estate under the terms and provisions and upon the uses and trusts expressed in the respective indentures in paragraph ten hereof referred to, such distribution shall not be considered a "final payment" as that term is employed in this paragraph.

Exhibit No. 1 (1)—(Continued)

City and County of Honolulu,
Territory of Hawaii—ss.

On this 28th day of May, A. D., 1935, before me appeared F. W. Jamieson and U. J. Rainalter to me personally known, who being by me duly sworn, did say that they are the Vice-President and Vice-President and Secretary respectively of Hawaiian Trust Company, Limited, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and the said F. W. Jamieson and U. J. Rainalter acknowledged said instrument to be the free act and deed of said corporation.

/s/ ALICE I. DOHERTY,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

GIFT TAX RETURN

CALENDAR YEAR 1935

(TO BE FILED IN DUPLICATE UNDER THE PROVISIONS OF THE
GIFT TAX ACT OF 1926, AS AMENDED)

(Place for use of Collector)

RECEIVED

NAME OF DONOR **EMIL C. PETERS**
ADDRESS **Honolulu, T. H.**
CITIZENSHIP **United States**
RESIDENCE **Honolulu, T. H.**

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) for the making of an irrevocable trust for the benefit of another? **No**
If making additions to an irrevocable trust previously created for the benefit of another? **No**
If purchasing a life insurance policy (other than one purchased to receive the proceeds from a revocable trust, where you possessed the power of revocation and chose during the year to exercise it, whether such trust was created before or after the enactment of Public Law 481 of the Gift Tax Act of 1926)? **No**
If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Amount of gifts for year other than charitable, etc., gifts (item c, schedule A) **41,736.87**
2. Amount of charitable, public, and similar gifts for year (item c, schedule B) **None**
3. Total amount of gifts for year (item 1 plus item 2) **41,736.87**
4. Amount of charitable, public, and similar gifts for year (item c, schedule B) **None**
5. Specific exemption claimed (not exceeding \$50,000 less total amount of specific exemption claimed for preceding years) **41,736.87**
6. Total deductions (item 4 plus item 5) **41,736.87**
7. Amount of net gifts for year (item 3 minus item 6) **None**

COMPUTATION OF TAX

1. Amount of net gifts for year (item 7, above) **None**
2. Total amount of net gifts for preceding years (item b, schedule C) **None**
3. Total net gifts (item 1 plus item 2) **None**
4. Tax computed on item 3 **None**
5. Tax computed on item 2 **None**
6. Tax on net gifts for year (item 4 minus item 5) **None**

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1926, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

Sworn to and subscribed before me this **16th** day of **April**, 193**6**

NOTARIAL
SEAL

(Name and title of officer administering oath)
Notary Public, State of Hawaii

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

Sworn to and subscribed before me this **16th** day of **April**, 193**6**

NOTARIAL
SEAL

(Name and title of officer administering oath)
Notary Public, State of Hawaii

HAWAIIAN TRUST CO., LTD.
BY **W. C. Camp**
Attorney at Law

SCHEDULE A—Gifts During Year Other than Charitable, Pub^l and Similar Gifts

ITEM NO.	DESCRIPTION OF GIFT, MOTIVE, DONEE'S NAME AND ADDRESS, AND RELATIONSHIP TO DONOR	DATE OF GIFT	VALUE AT DATE OF GIFT
			\$
(a) Total	As per schedule attached		\$ 46,736.87
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)			\$ 5,000.00
(c) Included amount of gifts for year other than charitable, etc., gifts			\$ 41,736.87

SCHEDULE B—Charitable, Public, and Similar Gifts During Year

ITEM NO.	DESCRIPTION OF GIFT, NAME AND ADDRESS OF DONEE, AND CHARACTER OF INSTITUTION	DATE OF GIFT	VALUE AT DATE OF GIFT
	None in Excess of \$5000.		\$ None
(a) Total			\$ None
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)			\$ None
(c) Included amount of charitable, public, and similar gifts for year			\$ None

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (Subsequent to June 6, 1932)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFTS
1932	None	\$	\$
1933	Honolulu	1459.50	None
1934	None		
(a) Total amount of specific exemption claimed for preceding years		\$ 1459.50	
(b) Total amount of net gifts for preceding years			\$ None

Form 706
TREASURY DEPARTMENT
(OFFICIAL BUSINESS PENALTY
\$5000)

GIFT TAX RETURN

CALENDAR YEAR 193-5

(TO BE FILED IN DUPLICATE UNDER THE PROVISIONS OF THE
GIFT TAX ACT OF 1932, AS AMENDED)

(By _____ of _____
RECEIVED

NAME OF DONOR **MARY MAPUANA PETERS**
ADDRESS **Honolulu, T. H.**
CITIZENSHIP **United States**
RESIDENCE **Honolulu, T. H.**

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) as follows? Answer "Yes" or "No."

1. By the creation of an irrevocable trust for the benefit of another **Yes**
2. By making additions to an irrevocable trust previously created for the benefit of another **No**
3. By permitting a beneficiary of a trust to exercise the power of revocability and those during the year not to exercise it, whether such trust was created before or after the enactment on June 8, 1932, of the Gift Tax Act of 1932 **No**
4. By relinquishing a power to revoke a trust created for the benefit of another **No**
5. By permitting another to withdraw funds from a joint bank account which were deposited by you **No**
6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy, without retaining any of the legal incidents of ownership, therein **No**
7. By paying a beneficiary, under all circumstances, a value not less than the fair market value of the property, and the proceeds of which are payable to a beneficiary other than yourself or your estate **No**
8. By receiving (directly, indirectly or through a third party) or for your estate or dependent child, interest or income by the activity **No**
9. By any other method, direct or indirect, whereby another received a gift **No**

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Amount of gifts for year other than charitable, etc., gifts (item c, schedule A)	\$27,370.45	
2. Amount of charitable, public, and similar gifts for year (item c, schedule B)	None	
3. Total amount of gifts for year (item 1 plus item 2)		\$27,370.45
4. Amount of charitable, public, and similar gifts for year (item c, schedule B)	None	
5. Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)	27,370.45	
6. Total deductions (item 4 plus item 5)		27,370.45
7. Amount of net gifts for year (item 3 minus item 6)		None

COMPUTATION OF TAX

1. Amount of net gifts for year (item 7, above)		None
2. Total amount of net gifts for preceding years (item b, schedule C)		None
3. Total net gifts (item 1 plus item 2)		None
4. Tax computed on item 3		
5. Tax computed on item 2		
6. Tax on net gifts for year (item 4 minus item 5)		None

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfers or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.



Sworn to and subscribed before me this 16th day of August, 1936

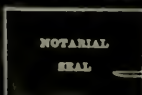
day of August, 1936

(Signature and title of official administering oath)

Mary Mapuana Peters
(Signature of donor/recipient)

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.



Sworn to and subscribed before me this 16th day of August, 1936

day of August, 1936

(Signature and title of official administering oath)

HAWAIIAN TRUST CO. LTD

BY _____
(Signature of person preparing return)

SCHEDULE A—In During Year Other than Charitable, Public, or Similar Gifts

ITEM NO.	DESCRIPTION OF GIFT, MOTIVE, DONOR'S NAME AND ADDRESS, AND RELATIONSHIP TO DONOR	DATE OF GIFT	VALUE AT DATE OF GIFT
(a) Total	As per schedule attached		\$ 27,370.45
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)			
(c) Included amount of gifts for year other than charitable, etc., gifts			\$ 27,370.45

SCHEDULE B—Charitable, Public, and Similar Gifts During Year

ITEM NO.	DESCRIPTION OF GIFT, NAME AND ADDRESS OF DONOR, AND CHARACTER OF INSTITUTION	DATE OF GIFT	VALUE AT DATE OF GIFT
	None in excess of \$5000.		None
(a) Total			\$
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)			
(c) Included amount of charitable, public, and similar gifts for year			\$ None

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (Subsequent to June 5, 1932)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFTS
1932	None	\$	\$
1933	Honolulu	None	None
1934	None	1,459.50	"
		None	"
(a) Total amount of specific exemption claimed for preceding years			\$ 1,459.50
(b) Total amount of net gifts for preceding years			\$ None

MARY MAPUANA PETERS

Schedule A - 1935 Gift Tax

<u>Item No.</u>	<u>Description</u>	<u>Date of Gift</u>
One-half interest in following property jointly owned with husband, Emil C. Peters, conveyed under irrevocable deed of Trust dated May 28, 1935 to Hawaiian Trust Co. Ltd., Trustee, subject to a total indebtedness at date of transfer of \$19,440. (For copy of trust deed see Gift Tax return of Emil C. Peters)		
	<u>Shares</u>	
1	5355 Pineapple Holding Co. @ 16 2/3 ^{917.42} \$89,596.25 (1750 shs Pledged to Bishop 1st Natl Bk) (605 " " " Bank of Hawaii)	5/28/35
2	50 Hawaiian Trust Co. Ltd. @ 175 ¹¹³ 8,750.00 (50 shs. Pledged to Bank of Hawaii)	-
3	150 Bishop National Bank of Haw @ 25 ²¹ 3,750.00	-
4	215 Bishop Trust Co. Ltd. @ 14 1/2 ^{11 1/2} 3,117.50	-
5	25 Bank of Hawaii @ 180 ²⁵ 4,500.00	-
6	25 Hawaiian Agricultural Co. @ 35 875.00	-
7	5 Inter-Island S. N. Co. @ 22 1/2 112.50	-
8	50 Pepeekeo Sugar Co. @ 28 ^{28 2/3} 1,400.00	-
9	5 Waianae Co. @ 142 1/2 ^{14 1/2} 712.50	-
	<u>Total Property in Trust</u>	\$112,913.75
	<u>Less indebtedness at May 28, 1935</u>	19,440.00
	Bishop 1st Natl Bank \$8000.00	
	Bank of Hawaii 11440.00	
	<u>Net Value of Property in Trust</u>	<u>\$93,473.75</u>
	<u>One-half Interest</u>	<u>\$46,736.87</u>
	<u>Less Life Interest of Mary Mapuana Peters reserved under terms of Trust. at age 57 (46,736.87 x 4% x 10.35931)</u>	<u>19,366.42</u>
	<u>Net Value of Property Transferred by Donor</u>	<u>\$27,370.45</u>

EXHIBIT No. 1 (4)

This Indenture made this 8th day of September, A. D. 1931 by and between Emil Cornelius Peters and Mary Mapuana Peters, husband and wife, whose residence and postoffice address is No. 653 Wyllie Street, Honolulu, City and County of Honolulu, Territory of Hawaii, parties of the first part, hereinafter called the "Settlors," and Hawaiian Trust Company, Limited, an Hawaiian corporation, whose principal place of business and postoffice address is No. 120 South King Street, Honolulu aforesaid, party of the second part, hereinafter called the "Trustee," which expression shall be deemed to include all successors in trust hereunder,

Witnesseth

That the settlors in consideration of their love and affection for their daughter, Mapuana Smith Peters, hereinafter called the "Beneficiary," and also in consideration of the terms, covenants and conditions in this instrument expressed on the part of the trustee to be observed and performed, do hereby grant, assign, transfer, set over and deliver unto said Hawaiian Trust Company, Limited in its capacity as trustee hereunder all of the following property, to-wit:

One Hundred (100) shares of the capital stock of the Hawaiian Pineapple Company, Limited, an Hawaiian corporation, evidenced by Certificate H1085.

To Have and to Hold the same and all proceeds

Exhibit No. 1 (4)—(Continued)

thereof and all property whatsoever into which the same may, or any part thereof, at any time or times be resolved by investment, reinvestment, exchange or otherwise, unto the said trustee and its successors in trust hereunder subject to the terms, conditions, charges and powers hereinafter mentioned and upon the following uses and trusts, namely:

1. To hold and manage the trust estate and to receive the rents, profits and income thereof and to pay from said property and from said rents, profits and income, all expenses and disbursements properly chargeable thereto respectively and to deal with and dispose of the remaining rents, profits and income in the manner and for the uses and purposes hereinafter set forth.

2. To pay the remaining net rents, profits and income to said beneficiary for and during the term of her natural life in quarterly payments or oftener as the trustee shall deem expedient.

3. The income herein directed to be paid to the beneficiary shall be made personally to her or upon her order or receipt in writing, that is, free from the interference or control of her creditors and never by way of anticipation or assignment, voluntary or involuntary. Moreover, said income shall be free from the control, liabilities or interference of any husband that said beneficiary may have.

4. If at any time or times on account of serious illness or other unforeseen emergency, the beneficiary shall, in the opinion of the trustee, imperatively require the expenditure upon her or for her

Exhibit No. 1 (4)—(Continued)

benefit of principal hereof, said trustee is hereby authorized to appropriate and expend for such purpose such an amount as it may deem necessary under the circumstances.

(5) The settlors hereby especially reserve to themselves and the survivor of them the rights (a) from time to time to change, modify or amend the provisions of this trust deed but not to revoke the same or to so change it that they or either of them will receive back any of the trust estate or any income therefrom; (b) by written instrument to change the trustee under this instrument, whether named or appointed by virtue of this instrument or otherwise, and to appoint a new trustee in the place and stead of the trustee so relieved; and (c) to appoint a successor trustee to fill any vacancy which may occur in the office of trustee. Upon every appointment of a new trustee, the trust property and all interest thereof shall immediately become vested in the new trustee, and every such new trustee shall thereupon have all the powers, authority and discretion to perform the trust of these presents as though originally named in this instrument, and without necessity of any conveyance to it, him or her by the retiring trustee, if any.

6. The settlors further reserve unto themselves and the survivor of them the right at any time to deliver, assign and set over and by last will and testament to devise and to bequeath to said trustee for the use and benefit of the beneficiary hereunder, other and additional property, real, personal or

Exhibit No. 1 (4)—(Continued)

mixed, and the same shall upon delivery or assignment to the trustee, or upon being vested in or distributed to it, become subject to all the conditions and terms of this indenture in like manner and to the same effect as though the same were now included herein.

7. The trustee shall have the following powers in addition to those otherwise expressly or by necessary implication to it herein granted:

(a) To invest and reinvest the personal property of the trust estate and to vary the securities in which the same from time to time may be invested.

(b) To buy, sell, mortgage, lease and otherwise acquire and dispose of real property and estates therein.

(c) To keep all buildings and improvements in good order, condition and repair.

(d) To pay and discharge all taxes, rates and assessments of every kind and description that may be levied or assessed upon or may become payable in respect of the trust estate or any part thereof or the interest of the beneficiary therein.

(e) To pay and discharge the reasonable costs and expenses incident to the administration of the trust hereby created, including its commissions.

Any lease executed by the trustee hereunder may be for such term as the trustee in its discretion may deem advisable, but in no event to exceed thirty (30) years. Nor shall the personal property of the trust estate be reinvested or varied by the trustee during the lifetime of the settlors or the survivor of them

Exhibit No. 1 (4)—(Continued)

and while they are respectively sui juris, without their, his or her previous written consent thereto.

9. Stock dividends received by the trustee shall not be distributed or be distributable as income, but shall be added to and form and become a part of principal. Otherwise, the final determination of what constitutes principal of the trust estate or the gross income thereof is committed to the absolute and uncontrolled discretion and power of the trustee.

10. It shall be the duty of the trustee:

(a) To render to the beneficiary annually a statement showing receipts and disbursements made in pursuance hereof during the accounting period and an inventory of principal and income on hand at the concluding day of the accounting period.

(b) Upon the death of the beneficiary hereunder, to distribute absolutely and in fee simple the remaining trust principal subject hereto and any unapplied income therefrom in the manner following, that is to say:

1. In the event of the beneficiary dying leaving issue, to distribute the same equally to the beneficiary's children and the issue of any deceased child by right of representation; and if there is no child of the beneficiary living at her death, to distribute the same to all of her other lineal descendants. If all of the said descendants are in the same degree of kindred to the beneficiary, they shall share per capita, that is, equally; otherwise, they shall share per stirpes, that is, by each of the children taking a

Exhibit No. 1 (4)—(Continued)

share, and the grandchildren, the children of a deceased child taking a share, to be equally divided among themselves.

2. If the beneficiary shall leave no issue, to distribute the same to her brother and sister, viz: E. C. Peters Jr. and Elsa H. Peters, and to their children by right of representation. If either said brother or said sister shall be dead without leaving children him or her respectively surviving, then the share of the one so dying shall go to the survivor of said brother or sister.

3. If the beneficiary shall leave no issue nor brother or sister nor children of any deceased brother or sister, to distribute the same to such person or persons as the said beneficiary may by her last will direct, or in default of such will and direction, to the heirs at law of said beneficiary absolutely and in accordance with the laws of descent of the Territory of Hawaii then obtaining.

The words "issue," "children" and "grandchildren," wherever in this paragraph employed, shall not be understood to mean or include, but on the contrary to exclude children by adoption.

(c) To deliver to the beneficiary a full, true and correct copy hereof.

(d) Upon the request of the settlors or the survivor of them, to resign as trustee hereunder.

11. Purchasers from the said trustee of any prop-

Exhibit No. 1 (4)—(Continued)

I hereby acknowledge receipt this.....day of September, 1931 of a full, true and correct copy of the foregoing indenture of trust.

Beneficiary

City and County of Honolulu,
Territory of Hawaii—ss.

On this 8th day of September, A. D. 1931, before me personally appeared Emil Cornelius Peters and Mary Mapuana Peters, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

/s/ H. J. EVENSEN,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

City and County of Honolulu,
Territory of Hawaii—ss.

On this 8th day of September, A. D. 1931, before me appeared P. K. McLean and C. J. Birnie, to me personally known, who being by me duly sworn did say that they are the vice-president and assistant secretary respectively of Hawaiian Trust Company, Limited and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said P. K. McLean and C. J.

Exhibit No. 1 (4)—(Continued)

Birnie acknowledged said instrument to be the free act and deed of said corporation.

/s/ H. J. EVENSEN,

Notary Public, First Judicial Circuit, Territory of Hawaii.

EXHIBIT No. 1 (5)

This Indenture made this 31st day of December, A. D. 1943, by and between Emil Cornelius Peters, whose residence and post office address is No. 20 Dowsett Avenue, Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part, hereinafter called the "surviving settlor", and Hawaiian Trust Company, Limited, a Hawaiian corporation, whose principal place of business and post office address is No. 120 South King Street, Honolulu aforesaid, party of the second part, hereinafter called the "trustee", which expression shall be deemed to include all successors in trust hereunder;

Whereas, heretofore and on, to wit, September 8, 1931, said surviving settlor, party of the first part herein, with his wife Mary Mapuana Peters, since deceased, as joint settlors, did execute to and with the Hawaiian Trust Company, Limited, a Hawaiian corporation, party of the second part herein, an indenture of trust of which the child of the settlors, to wit, Mapuana Peters McComas (nee Mapuana Smith Peters), was principal beneficiary, and the

Exhibit No. 1 (5)—(Continued)

said trust for the said beneficiary is still in full force and effect; and

Whereas, by said indenture of trust there was reserved to the said joint settlors and the survivor of them the right "from time to time to change, modify or amend the provisions of this trust deed but not to revoke the same or to so change it that they or either of them will receive back any of the trust estate or any income therefrom"; and

Whereas, the said Mary Mapuana Peters has since departed this life and the party of the first part herein is the survivor of the said joint settlors; and

Whereas, it is the desire and purpose of the surviving settlor to change, modify and amend certain provisions of said indenture of trust of September 8, 1931;

Now Therefore, This Indenture Witnesseth:

That the surviving settlor, in exercise of the right reserved to him in said indenture of trust of September 8, 1931, to change, modify or amend the provisions thereof, does hereby change and modify the following provisions of said indenture of trust, that is to say:

1. That he does hereby change, modify and amend paragraph 2 of the uses and trusts set forth on page 2 of said indenture by adding thereto the following paragraph:

Exhibit No. 1 (5)—(Continued)

“Should said income, together with other means of livelihood available to the said beneficiary, prove insufficient for her reasonable and proper maintenance and support, the trustee may invade the principal to the extent necessary to make up such deficiency.”

So that this paragraph as amended shall read as follows:

“2. To pay the remaining net rents, profits and income to said beneficiary for and during the term of her natural life in quarterly payments or oftener as the trustee shall deem expedient.

“Should said income, together with other means of livelihood available to the said beneficiary, prove insufficient for her reasonable and proper maintenance and support, the trustee may invade the principal to the extent necessary to make up such deficiency.”

2. That he does hereby change, modify and amend paragraph 4 of the uses and trusts set forth on page 2 of said indenture of trust by deleting therefrom the word “imperatively” in line 3 and substituting in lieu thereof the word “reasonably” so that this paragraph shall read as follows:

“4. If at any time or times on account of serious illness or other unforeseen emergency, the beneficiary shall, in the opinion of the trustee, reasonably require the expenditure upon

Exhibit No. 1 (5)—(Continued)

her or for her benefit of principal hereof, said trustee is hereby authorized to appropriate and expend for such purpose such an amount as it may deem necessary under the circumstances.”

3. That he does hereby change, modify and amend sub-subparagraph 2 of subparagraph (b) of paragraph 10 set forth on page 5 of said indenture of trust so that this sub-subparagraph shall read as follows:

“2. If the beneficiary shall leave surviving her no issue, to distribute the same to those who shall be living at her death of her brother, E. C. Peters, Jr., and her sister, Elsa Peters Steen, and of the issue of either or both of them who shall be then deceased, said issue taking per stirpes by right of representation in each generation.”

4. That he does hereby change, modify and amend sub-subparagraph 3 of subparagraph (b) of paragraph 10 set forth on page 6 of said indenture of trust so that this sub-subparagraph shall read as follows:

“3. If the beneficiary shall leave surviving her no issue nor said brother nor said sister nor issue of either of said brother or said sister, to distribute the same to such person or persons as the said beneficiary may by her last will direct, or in default of such will and direction to those who would have been the heirs at law of said beneficiary absolutely and in accordance

Exhibit No. 1 (5)—(Continued)

with the laws of descent of the Territory of Hawaii then obtaining if she had then died intestate and domiciled in the Territory of Hawaii and if she had not been survived by the Settlor or any minor child of the Settlor.”

5. That he does hereby irrevocably release and extinguish the right in the surviving settlor to shift or to effect a partial or complete alteration of the economic benefits of the trust created by said indenture of September 8, 1931, and does hereby change, modify and amend paragraph 5 set forth on page 3 of said indenture of trust by limiting the power of amendment reserved therein so that the surviving Settlor shall not hereafter have the right to shift or to effect a partial or complete alteration of the economic benefits of the trust created by said indenture of September 8, 1931.

And the trustee, in consideration of the premises, does hereby and by these presents acknowledge, agree to and confirm the changes, modifications and amendments of the said indenture of trust of September 8, 1931, and undertakes and agrees by and with the surviving settlor to execute the trusts by said indenture of trust created as hereby changed, modified and amended.

In Witness Whereof, the said surviving Settlor has hereunto set his hand and seal, and the Trustee has caused its name to be hereunto subscribed and its corporate seal affixed by its proper officers there-

Exhibit No. 1 (5)—(Continued)

unto duly authorized the day and year first above written.

(Seal) /s/ EMIL CORNELIUS PETERS
Surviving Settlor

HAWAIIAN TRUST COM-
PANY, LIMITED, Trustee

/s/ By H. W. B. WHITE
Its Asst. Vice-President
and

/s/ F. W. KLEBAHN, JR.,
Its Asst. Treasurer

Territory of Hawaii,
City and County of Honolulu—ss.

On this 31 day of December, A. D. 1943, before me personally appeared Emil Cornelius Peters, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ETHEL E. DANFORD,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires November 30, 1946.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 31 day of December, A.D. 1943, before me appeared H. W. B. White and F. W. Klebahn, Jr., to me personally known, who, being by me duly sworn, did say that they are the Assistant Vice Presi-

Exhibit No. 1 (5)—(Continued)

dent and Assistant Treasurer respectively of Hawaiian Trust Company, Limited, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said H. W. B. White and F. W. Klebahn, Jr., acknowledged said instrument to be the free act and deed of said corporation as Trustee.

/s/ ETHEL E. DANFORD,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires November 30, 1946.

EXHIBIT No. 1 (6)

AMENDMENT OF TRUST INDENTURE

This Indenture made this 1st day of January, A. D. 1944, by and between Emil Cornelius Peters, whose residence and post office address is No. 20 Dowsett Avenue, Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part, hereinafter called the "surviving settlor," and Hawaiian Trust Company, Limited, a Hawaiian corporation, whose principal place of business and post office address is No. 120 South King Street, Honolulu aforesaid, party of the second part, hereinafter called the "trustee," which expression shall be deemed to include all successors in trust hereunder;

Whereas, heretofore and on, to wit, September 8, 1931, Emil Cornelius Peters, with his wife Mary

Exhibit No. 1 (6)—(Continued)

Mapuana Peters, since deceased, as joint settlors, did execute to and with the Hawaiian Trust Company, Limited, a Hawaiian corporation, three separate indentures of trust containing substantially the same terms and provisions, of each of which the children of the said joint settlors, to wit, Mapuana Peters McComas (nee Mapuana Smith Peters), Emil Cornelius Peters, Jr., and Elsa Peters Steen (nee Elsa Hildebrandt Peters) were respectively beneficiaries, and the respective trusts for the respective beneficiaries thereby respectively created are still in full force and effect; and

Whereas, thereafter and on, to wit, May 28, 1935, the surviving settlor, party of the first part herein, with his wife Mary Mapuana Peters, since deceased, as joint settlors, did execute with the party of the second part herein as trustee a certain indenture of trust wherein there was expressly reserved unto the joint settlors and the survivor of them the right “from time to time to change, modify or amend the provisions of this trust instrument but not to revoke the same or to change it that they or either of them will receive back any of the trust estate”; and

Whereas, the said Mary Mapuana Peters has since departed this life and the party of the first part herein is the survivor of the said joint settlors; and

Whereas, the trust created by the said indenture
Now Therefore, This Indenture Witnesseth:

That the surviving settlor of the joint settlors

Exhibit No. 1 (6)—(Continued)

named in the said indenture of trust of May 28, 1935, in the exercise of the right therein reserved to him as survivor of said joint settlors from time to time to change, modify or amend the provisions of said indenture of trust of May 28, 1935, but not to revoke the same or to change it that he shall receive back any of the trust estate thereby created, and of all other rights and powers him thereunto enabling, does hereby change, modify and amend the provisions of said indenture of trust of May 28, 1935, as follows: by incorporating therein an instruction to said Hawaiian Trust Company, Limited, in its capacity as trustee under said indenture of trust of May 28, 1935, to grant, assign, transfer, set over and deliver as of this first day of January, 1944, to said Hawaiian Trust Company, Limited, in its capacity as trustee under said three indentures of trust of September 8, 1931, respectively, all of the following described property now included in the trust estate held by it as trustee under said indenture of trust of May 28, 1935, in the following shares, it being understood and agreed that all responsibility and liability of said Hawaiian Trust Company, Limited, as trustee under said indenture of trust of May 28, 1935, shall cease as to said property upon such transfer and delivery:

(a) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931 under which said Mapuana Peters McComas is the principal beneficiary, the following property to be held by it as trustee under the terms and provisions of and upon the uses and trusts ex-

Exhibit No. 1 (6)—(Continued)

pressed in said indenture of trust under which said Mapuana Peters McComas is the principal beneficiary:

Bank of Hawaii	8 shares
Bishop National Bank of Hawaii.....	50 shares
Hawaiian Agricultural Co.	8 shares
Hawaiian Pineapple Co.....	1228 shares
Pepeekeo Sugar Co.....	16 shares
Hawaiian Trust Co., Ltd.....	21 shares
Waianae Co.	8 shares

(b) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931 under which said Emil Cornelius Peters, Jr., is the principal beneficiary, the following property to be held by it as trustee under the terms and provisions of and upon the uses and trusts expressed in said indenture of trust under which said Emil Cornelius Peters, Jr., is the principal beneficiary:

Bank of Hawaii.....	8 shares
Bishop National Bank of Hawaii.....	50 shares
Hawaiian Agricultural Co.	8 shares
Hawaiian Pineapple Co.....	1228 shares
Pepeekeo Sugar Co.....	16 shares
Hawaiian Trust Co., Ltd.....	21 shares
Waianae Co.	8 shares

(c) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931 under which said Elsa Peters Steen (nee Elsa Hildebrant Peters) is the principal beneficiary, the following property to be held by it as trustee under the terms and provisions of and upon the uses and trusts expressed in said indenture of trust

Exhibit No. 1 (6)—(Continued)

under which said Elsa Peters Steen is the principal beneficiary:

Bank of Hawaii.....	8 shares
Bishop National Bank of Hawaii.....	50 shares
Hawaiian Agricultural Co.	8 shares
Hawaiian Pineapple Co.....	1228 shares
Hawaiian Trust Co., Ltd.....	21 shares
Pepeekeo Sugar Co.	16 shares
Waianae Co.	8 shares

And the party of the second part, in consideration of the premises, does hereby, by these presents, accept, agree to and confirm the amendments hereby made by the surviving settlor, party of the first part, in said indenture of trust of May 28, 1935, and agrees to obey the foregoing instructions hereby incorporated in said indenture of trust of May 28, 1935, and to grant, assign, transfer, set over and deliver the above described property as required by said instructions.

In Witness Whereof, the said surviving settlor has hereunto set his hand and seal, and the trustee has caused its name to be hereunto subscribed and its corporate seal affixed by its proper officers thereunto duly authorized the day and year first above written.

(Seal) /s/ EMIL CORNELIUS PETERS

HAWAIIAN TRUST COMPANY, LIMITED, Trustee

/s/ By H. W. B. WHITE
Asst. Vice Pres.

/s/ By F. W. KLEBAHN, JR.,
Asst. Treas.

Exhibit No. 1 (6)—(Continued)

Territory of Hawaii,

City and County of Honolulu—ss.

On this 3 day of January, A. D. 1944, before me personally appeared Emil Cornelius Peters to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ETHEL E. DANFORD,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires November 30, 1946.

Territory of Hawaii,

City and County of Honolulu—ss.

On this 3 day of January, A. D. 1944, before me appeared H. W. B. White and F. W. Klebahn, Jr., to me personally known, who, being by me duly sworn, did say that they are the Assistant Vice President and Assistant Treasurer respectively of Hawaiian Trust Company, Limited, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said H. W. B. White and F. W. Klebahn, Jr., acknowledged said instrument to be the free act and deed of said corporation as Trustee.

/s/ ETHEL E. DANFORD,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires November 30, 1946.

EXHIBIT No. 1 (7)

AMENDMENT OF TRUST INDENTURE

This Indenture made this 25th day of October, A. D. 1944, by and between Emil Cornelius Peters, whose residence and post office address is No. 20 Dowsett Avenue, Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part, hereinafter called the "surviving settlor," and Hawaiian Trust Company, Limited, a Hawaiian corporation, whose principal place of business and post office address is No. 120 South King Street, Honolulu aforesaid, party of the second part, hereinafter called the "trustee", which expression shall be deemed to include all successors in trust hereunder;

Whereas, heretofore and on, to wit, September 8, 1931, Emil Cornelius Peters, with his wife Mary Mapuana Peters, since deceased, as joint settlors, did execute to and with the Hawaiian Trust Company, Limited, a Hawaiian corporation, three separate indentures of trust containing substantially the same terms and provisions, of each of which the children of the said joint settlors, to wit, Mapuana Peters McComas (nee Mapuana Smith Peters), Emil Cornelius Peters, Jr., and Elsa Peters Steen (nee Elsa Hildebrandt Peters) were respectively beneficiaries, and thereafter and on, to wit, December 31, 1943, said Emil Cornelius Peters, as the "surviving settlor" did execute to and with said Hawaiian Trust Company, Limited, as trustee, amendments of each of said three separate indentures of trust, and

Exhibit No. 1 (7)—(Continued)

the respective trusts as so amended for the respective beneficiaries thereby respectively created are still in full force and effect; and

Whereas, thereafter and on, to wit, May 28, 1935, the surviving settlor, party of the first part herein, with his wife Mary Mapuana Peters, since deceased, as joint settlors, did execute with the party of the second part herein as trustee a certain indenture of trust wherein there was expressly reserved unto the joint settlors and the survivor of them the right "from time to time to change, modify or amend the provisions of this trust instrument but not to revoke the same or to change it that they or either of them will receive back any of the trust estate," and thereafter and on, to wit, January 1, 1944, said Emil Cornelius Peters, as the "surviving settlor", did execute to and with said Hawaiian Trust Company, Limited, as trustee, amendments of said indenture of trust dated May 28, 1935; and

Whereas, the said Mary Mapuana Peters has departed this life and the party of the first part herein is the survivor of the said joint settlors; and

Whereas, the trust created by the said indenture of May 28, 1935, as amended, remains in full force and effect;

Now, Therefore, This Indenture Witnesseth:

That the surviving settlor of the joint settlors named in the said indenture of trust of May 28, 1935, in the exercise of the right therein reserved to him

Exhibit No. 1 (7)—(Continued)

as survivor of said joint settlors from time to time to change, modify or amend the provisions of said indenture of trust of May 28, 1935, but not to revoke the same or to change it that he shall receive back any of the trust estate thereby created, and of all other rights and powers him thereunto enabling, does hereby change, modify and amend the provisions of said indenture of trust of May 28, 1935, as heretofore amended, as follows: by incorporating therein an instruction to said Hawaiian Trust Company, Limited, in its capacity as trustee under said indenture of trust of May 28, 1935, as amended, to pay as of the date hereof, to said Hawaiian Trust Company, Limited, in its capacity as trustee under said three indentures of trust of September 8, 1931, as amended respectively, all of the property now included in the trust estate held by it as trustee under said indenture of trust of May 28, 1935, as amended, in equal shares as follows, all of said property being now in the form of cash and amounting to the total net sum of \$484.53, it being understood and agreed that all responsibility and liability of said Hawaiian Trust Company, Limited, as trustee under said indenture of trust of May 28, 1935, as amended, shall cease as to said property upon such payment:

(a) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931, as amended, under which said Mapuana Peters McComas is the principal beneficiary, the sum of \$161.51, to be held by it as trustee under the terms and provisions of and upon the uses and

Exhibit No. 1 (7)—(Continued)

trusts expressed in said indenture of trust, as amended, under which said Mapuana Peters McComas is the principal beneficiary;

(b) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931, as amended, under which said Emil Cornelius Peters, Jr., is the principal beneficiary, the sum of \$161.51, to be held by it as trustee under the terms and provisions of and upon the uses and trusts expressed in said indenture of trust under which said Emil Cornelius Peters, Jr., is the principal beneficiary;

(c) To said Hawaiian Trust Company, Limited, trustee under said indenture of trust dated September 8, 1931, as amended, under which said Elsa Peters Steen (nee Elsa Hildebrant Peters) is the principal beneficiary, the sum of \$161.51, to be held by it as trustee under the terms and provisions of and upon the uses and trusts expressed in said indenture of trust under which said Elsa Peters Steen is the principal beneficiary;

And the party of the second part, in consideration of the premises, does hereby, by these presents, accept, agree to and confirm the amendments hereby made by the surviving settlor, party of the first part, in said indenture of trust of May 28, 1935, as heretofore amended, and agrees to obey the foregoing instructions hereby incorporated in said indenture of trust of May 28, 1935, as heretofore

Exhibit No. 1 (7)—(Continued)

amended, and to pay the said money as required by said instructions.

In Witness Whereof, the said surviving settlor has hereunto set his hand and seal, and the trustee has caused its name to be hereunto subscribed and its corporate seal affixed by its proper officers thereunto duly authorized the day and year first above written.

(Seal) /s/ EMIL CORNELIUS PETERS

HAWAIIAN TRUST COM-
PANY, LIMITED, Trustee

/s/ By P. K. McLEAN
Vice President

/s/ By C. J. BIRNIE
Asst. Vice President

Territory of Hawaii,
City and County of Honolulu—ss.

On this 26th day of October, A. D. 1944, before me personally appeared Emil Cornelius Peters, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ETHEL E. DANFORD,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires November 30, 1946.

Exhibit No. 1 (7)—(Continued)

Territory of Hawaii,

City and County of Honolulu—ss.

On this 26th day of October, A. D. 1944, before me appeared P. K. McLean and C. J. Birnie, to me personally known, who, being by me duly sworn, did say that they are the Vice President and Assistant Vice President respectively of Hawaiian Trust Company, Limited, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said P. K. McLean and C. J. Birnie acknowledged said instrument to be the free act and deed of said corporation as Trustee.

/s/ ETHEL E. DANFORD,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires November 30, 1946.

EXHIBIT No. 1 (8)

TERMINATION OF TRUST

This Indenture made this 26th day of October, A. D. 1944, by and between Emil Cornelius Peters, whose residence and post office address is No. 20 Dowsett Avenue, Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part, hereinafter called the "surviving settlor," and Hawaiian Trust Company, Limited, a Hawaiian corporation, whose principal place of business and

Exhibit No. 1 (8)—(Continued)

post office address is No. 120 South King Street, Honolulu aforesaid, party of the second part, hereinafter called the "trustee," which expression shall be deemed to include all successors in trust hereunder;

Whereas, heretofore and on, to wit, May 28, 1935, the surviving settlor, party of the first part herein, with his wife, Mary Mapuana Peters, since deceased, as joint settlors, did execute with the party of the second part herein, as trustee, a certain indenture of trust, and thereafter and on, to wit, January 1, 1944, the said surviving settlor did execute with said trustee certain amendments of said indenture of trust and thereafter and on, to wit, October 25, 1944, the said surviving settlor did execute with said trustee certain further amendments of said indenture of trust; and

Whereas, under and in accordance with the provisions of said indenture of trust, as amended, and in compliance with instructions from said surviving settlor to said trustee contained therein said trustee has transferred, delivered and paid to the Hawaiian Trust Company, Limited, in its capacity as trustee under certain other indentures of trust, all of the property included in the trust estate held by it as trustee under said indenture of trust dated May 28, 1935, as amended, and there are no longer any assets covered by and subject to said indenture of trust dated May 28, 1935, as amended; and

Whereas, both said surviving settlor and said

Exhibit No. 1 (8)—(Continued)

trustee believe that it is advisable that said trust created by the said indenture of trust dated May 28, 1935, as amended be immediately terminated and desire so to terminate said trust,

Now, Therefore, This Indenture Witnesseth:

That the said surviving settlor, party of the first part herein, and said trustee, party of the second part herein, hereby each in consideration of the others execution hereof and in the exercise of all powers them thereunto enabling do hereby jointly terminate said trust created by said indenture of trust dated May 28, 1935, as amended, and do hereby jointly cancel the said indenture of trust, as amended, and do hereby each release the other from all rights and claims arising under or by reason of said indenture of trust, as amended.

In Witness Whereof, the said surviving settlor has hereunto set his hand and seal, and the trustee has caused its name to be hereunto subscribed and its corporate seal affixed by its proper officers thereunto duly authorized the day and year first above written.

(Seal) /s/ EMIL CORNELIUS PETERS

HAWAIIAN TRUST COM-
PANY, LIMITED, Trustee

/s/ By P. K. McLEAN
Vice President

/s/ By C. J. BIRNIE
Asst. Vice President

Exhibit No. 1 (8)—(Continued)

Territory of Hawaii,
City and County of Honolulu—ss.

On this 26th day of October, A. D. 1944, before me personally appeared Emil Cornelius Peters, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ETHEL E. DANFORD,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires November 30, 1946.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 26th day of October, A. D. 1944, before me appeared P. K. McLean and C. J. Birnie to me personally known, who, being by me duly sworn, did say that they are the Vice President and Assistant Vice President respectively of Hawaiian Trust Company, Limited, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said P. K. McLean and C. J. Birnie acknowledged said instrument to be the free act and deed of said corporation as Trustee.

/s/ ETHEL E. DANFORD,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires November 30, 1946.

Chrysomelids from Japan (cf. *Chrysomelids*)

(To be filed in duplicate with the Collector of Internal Revenue for the donor's district not later than the 15th day of March following the close of the calendar year.)

DONOR EMIL C. PETERS
(Print name) (and last name, if first) (Telephone)
 ADDRESS Hawaiian Trust Co., Ltd., Honolulu, T.H.
 CITIZENSHIP United States
 RESIDENCE Honolulu, T. H.

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$3,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

[illegible]

to a willfully a beneficiary, other than myself, to receive the income from a trust created by gift and with respect to which you retained the power to prevent the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits. (No -)

4. I permitted another to withdraw funds from a joint bank account which were deposited by me (No -)

5. I or any other individual, firm or individual, Yes ()

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

4. Total included amount of gifts for year (item c, schedule A) \$ 21,155.55

5. Total deductions for charitable, public, and similar gifts for year (item c, schedule B) ... \$

6. Specific exemption claimed (see section 11 of instructions)

7. Total deductions (item 2 plus item 3)

8. Amount of net gifts for year (item 1 minus item 4) \$ 21,155.55

COMPUTATION OF TAX (see section 15 of instructions)

1. Amount of net gifts for year (Item 5, above)	21,155.58
2. Total amount of net gifts for preceding years (item c, schedule C)	13,126.27
3. Total net gifts (Item 1 plus Item 2)	34,281.85
4. Tax computed on Item 3	8,837.51
5. Tax computed on Item 2	638.70
6. Tax on net gifts for year (Item 4 minus Item 5)	2,198.81

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer of transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL
SEAL

Sworn to and subscribed before me this _____
day of _____, 19____

(Signature and title of officer administering oath)

(A Address of persons filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedule and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL
SEAL

Sworn to and subscribed before me this _____
day of _____, 19____

Signature and title of officer administering oath

(L.A.M.S. no. 97-0000000000000000)

SCHEDULE A—Total Gifts During Year (see sections 5, 6, 7, 8, 9, 10, 12, and 16 of instructions)

ITEM No.	DESCRIPTION OF GIFT, AND DONEE'S NAME AND ADDRESS	DATE OF GIFT	VALUE AT DATE OF GIFT
	AS PER SCHEDULE		\$

(a) Total \$ 33,155.55
 (b) Less total exclusions not exceeding \$3,000 for each donee (except gifts of future interests) 12,000.00
 (c) Total included amount of gifts for year PER SCHEDULE ATTACHED \$ 21,155.55

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see sections 10 and 13 of instructions)

ITEM No.	NAME AND ADDRESS OF DONEE, AND CHARACTER OF INSTITUTION	VALUE AT DATE OF GIFT
	None in excess of \$3,000.00	\$

(a) Total \$
 (b) Less total exclusions not exceeding \$3,000 for each donee (except gifts of future interests) \$
 (c) Total deductions for charitable, public, and similar gifts for year \$

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (subsequent to June 5, 1931)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFTS
1933	Hawaii	\$ 1,459.50	\$ none
1935	Hawaii	41,736.87	none
		44,200.44	

(a) Totals for preceding years (without adjustment for reduced specific exemption) \$ 43,196.37 \$ none
 (b) Amount, if any, by which total specific exemption, line a, exceeds \$30,000 (see section 14 of instructions) 13,196.37
 (c) Total amount of net gifts for preceding years (total last column, line a, plus amount, if any, line b) \$ 13,196.37

(If more space is needed, attach additional sheets of same size)

14,200.44

U.S. DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Revised October 1941)

(Name for use of Collector)
RECEIVED

UNITED STATES
GIFT TAX RETURN
CALENDAR YEAR 1944

TAXPAYER'S COPY
(Detach and retain this copy and the instructions)

(To be filed in duplicate with the Collector of Internal Revenue for the district in which the donor resides not later than the 15th day of March following the close of the year)

DONOR (Given name) (Middle name or initial) (Last name)
ADDRESS
CITIZENSHIP
RESIDENCE



Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$3,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

- 1. By the creation of a trust (....) or the making of additions to a trust previously created (....) in either case for the benefit of a person or persons other than yourself, and with respect to which you retained no power to revoke the beneficial title to the property, to yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously created trust (....).
- 2. By permitting a beneficiary, other than yourself, to exercise the income from a trust created by you and with respect to which you retained the power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits (....).
- 3. By the purchase of a life insurance policy (....) or the payment of a premium on a previously issued policy (....) the proceeds of which are in either case payable to a beneficiary other than your estate, and with respect to which you retained no power to revoke the economic benefits in yourself or your estate or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously issued policy (....).
- 4. By permitting another to withdraw funds from a joint bank account which were deposited by you (....).
- 5. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety (....).
- 6. By the exercise or exercise of a power of appointment, except as provided in subparagraphs 1 and 2 of section 3 of the instructions (....).
- 7. By conveying community property to another, or by conveying community property into separate property of your spouse or into a tenancy by the entirety of yourself and spouse (or other similar ownership), to the extent of your interest as prescribed by the rule set forth in section 3 of the instructions (....).
- 8. By any other method, direct or indirect (....).

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (item c, schedule A) \$
2. Total deductions for charitable, public, and similar gifts for year (item c, schedule B) \$
3. Specific exemption claimed (see section 11 of instructions)
4. Total deductions (item 2 plus item 3)
5. Amount of net gifts for year (item 1 minus item 4)

COMPUTATION OF TAX (see section 13 of instructions)

1. Amount of net gifts for year (item 5, above)
2. Total amount of net gifts for preceding years (item c, schedule C)
3. Total net gifts (item 1 plus item 2)
4. Tax computed on item 3
5. Tax on net gifts for year (item 4 minus item 3)
6. Total tax

FEDERAL AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL SEAL

Sworn to and subscribed before me this 7th day of March, 1945

Signature of donor (or executor, other person)
P. C. Box 3145 Honolulu, Hawaii

NOTARY PUBLIC AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL SEAL

Sworn to and subscribed before me this 7th day of March, 1945

Signature of person preparing return
(Address of person preparing return)

SCHEDULE A—Total Gifts During Year (see sections 5, 6, 7, 8, 9, 10, 12, and 14 of instructions)

ITEM No.	DESCRIPTION OF GIFT, AND DONEE'S NAME AND ADDRESS	DATE OF GIFT	VALUE AT DATE OF GIFT
			\$

- (a) Total.....\$
- (b) Less total exclusions not exceeding \$3,000 for each donee (except gifts of future interests).....\$
- (c) Total included amount of gifts for year.....\$

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see sections 10 and 15 of instructions)

ITEM No.	NAME AND ADDRESS OF DONEE, AND CHARACTER OF INSTITUTION	VALUE AT DATE OF GIFT
		\$

- (a) Total.....\$
- (b) Less total exclusions not exceeding \$3,000 for each donee (except gifts of future interests).....\$
- (c) Total deductions for charitable, public, and similar gifts for year.....\$

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (subsequent to June 6, 1932)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFT
1933	Hawaii	\$ 1,459.50	\$ None
1935	Hawaii	41,735.87	None
1943	Hawaii	None	21,155.55

- (a) Totals for preceding years (without adjustment for reduced specific exemption).....\$ 43,195.37.....\$ 21,155.55
- (b) Amount, if any, by which total specific exemption, line a, exceeds \$30,000 (see section 14 of instructions).....13,195.37
- (c) = Total amount of net gifts for preceding years (total, last column, line a, plus amount, if any, line b).....\$ 34,351.92

(If more space is needed, attach additional sheets of same size)

Exhibit No. 1 (10)—(Continued)

In 1944 taxpayer relinquished certain powers and control with respect to the property and income of a "Discretionary Trust" created prior to January 1, 1939 (i.e. May 28, 1935) by taxpayer and his wife now deceased.

Said relinquishment was nontaxable in conformity with the provisions of section 1000 (3) of the Internal Revenue Code, in view of the fact that the transfer in trust under indenture of May 28, 1935 was treated as a taxable gift and gift tax returns were duly filed for the calendar year 1935.

Full details regarding the aforesaid relinquishment, together with taxpayer's written consent to treat the said transfer of May 28, 1935 as a taxable transfer for the year 1935 and for all periods thereafter, as required by section 1000 (3) of the Internal Revenue Code, are contained in taxpayer's letter, together with accompanying documents attached and made a part of this return.

EXHIBIT No. 1 (11)

Chambers of Associate Justice E. C. Peters
Supreme Court of Hawaii

[Stamped]: Received—Files Mar 12 1945—Estate
Tax. Received from Files Mar 14 1945—Gift Tax.

[In longhand]: To KBF ER Ha 14

Commissioner of Internal Revenue,
Department of the Treasury,
Washington 25, D. C.

March 7, 1945

Dear Sir:

Pursuant to your letter of Nov. 1, 1944, reference MT-ET-GT-RR, addressed to the Hawaiian Trust Company, Ltd., 120 South King St., Honolulu, Hawaii, over the signature of the Honorable D. S. Bliss, Deputy Commissioner, I am forwarding to you for the attention of the miscellaneous tax unit the consent required under section 502 of the Revenue Act of 1943, in duplicate.

I have also filed with the local collector a gift tax return for the calendar year 1944 on form 709, together with copies of the enclosed consent together with the accompanying documents attached.

Respectfully yours,

/s/ E. C. PETERS

ju—encls

Memo: EXHIBIT No. 1 (12)

Donor: Emil C. Peters

Schedule 1-a

Explanation of adjustment to Net Gifts—

Schedule A of Return

1-1-1944 Gifts	Return	Corrected
36.84 shares Hawaiian Pines at 22.....	—0—	\$81,048.00
63 shares Hawaiian Trust Co. at 1.40.....	—0—	8,820.00
150 shares Bishop Nat'l. Bnk. at 34½.....	—0—	5,175.00
24 shares Bank of Hawaii at 2.40.....	—0—	5,760.00
24 shares Hawaiian Agri. at 24.....	—0—	576.00
48 shares Peepukeo Sugar at 22.....	—0—	1,056.00
24 shares Waeanae Co. at 6.....	—0—	144.00
10-25-1944 Gifts		
Cash.....		484.53
Total.....		<u>\$103,063.53</u>
Gift of one-half interest equals.....		<u>\$ 51,531.77</u>

The adjustment with respect to the above changes is based upon Section 452 (b) and (c) (1) of the Revenue Act of 1942. Also Section 451 of the Revenue Act of 1942, Gift Tax Regulations 108, Sections 86.2 (b) and (c) and Section 86.3.

The Donor is subject to Gift Tax on one-half the value of the Corpus paid over to the three Trusts of September 8, 1931, upon January 1, 1944 and October 25, 1944, as he exercised the right reserved to him in the Trust of May 28, 1935, to change, modify and amend the provisions thereof thereby releasing a general power of appointment.

Exhibit No. 1 (12)—(Continued)

Computation of Gift Tax

	Return	Recommended
Amount of net gifts 1944.....	—0—	\$51,531.77
Amount of net gifts preceding years.....		35,355.99
		<hr/>
Total amount of net gifts.....		86,887.76
Less: exclusion		9,000.00
		<hr/>
Total net gifts		77,887.76
Less: Specific exemption		—0—
		<hr/>
Total net gifts for tax.....		77,887.76
Tax on total net gifts.....		10,881.43
Tax on net gifts for preceding years.....		2,973.06
		<hr/>
Deficiency		\$ 7,908.37

I hereby certify this is a true copy of the original schedule.

/s/ H. A. PETERSON,

5/19/50

Internal Revenue Agent in
Charge.

[Endorsed]: Filed October 5, 1950.

EXHIBIT No. 1 (13)

(T. D. 5366)

Title 26—Internal Revenue

Chapter I—Subchapter B—Part 86—Gift Tax

Regulations 108 amended to conform to
the Revenue Act of 1943

Treasury Department, Office of Commissioner of
Internal Revenue, Washington 25, D. C.

To Collectors of Internal Revenue
and Others Concerned:

In order to conform Regulations 108 [Part 86,

Exhibit No. 1 (13)—(Continued)

Title 26, Code of Federal Regulations, 1943 Sup.] to sections 502 and 505 of the Revenue Act of 1943 (Public Law 235, 78th Congress), enacted February 25, 1944, such regulations are amended as follows:

Paragraph 1. There is inserted immediately preceding section 86.1 the following:

Sec. 502. Certain Discretionary Trusts in Connection With Gift Tax. (Revenue Act of 1943, Title V, enacted February 25, 1944.)

(a) Amendment of the Internal Revenue Code—Section 1000 of the Internal Revenue Code (imposing the gift tax) is amended by inserting at the end thereof the following:

“(e) Certain Discretionary Trusts.—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1940, and prior to January 1, 1945, of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this chapter. If such property was transferred in trust, the grantor not retaining such power to re-

Exhibit No. 1 (13)—(Continued)

vest title thereto in himself, or if such power to re-vest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this chapter to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this chapter. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property.”

* * * *

(c) Interest on Overpayments.—No interest shall be allowed or paid on any overpayment resulting from the application of this section.

Sec. 505. Extension of Time in Connection With Release of Powers of Appointment. (Revenue Act of 1943, Title V, enacted February 25, 1944.)

* * * section 452 (c) of the Revenue Act of 1942 is amended to read as follows:

Exhibit No. 1 (13)—(Continued)

“(c) Release Before January 1, 1945.—

“(1) A release of power to appoint before January 1, 1945, shall not be deemed a transfer of property by the individual possessing such power.

“(2) This subsection shall apply to all calendar years prior to 1945.”

Par. 2: Section 86.2 (b) is amended as follows:

(A) By changing the second sentence of the first paragraph to read as follows:

The release before January 1, 1945, of a power to appoint created on or before October 21, 1942, the date of enactment of the Revenue Act of 1942, is excepted from the application of the tax by reason of the express provisions of section 452 (c) of the Revenue Act of 1942, as amended by section 505 of the Revenue Act of 1943.

(B) By changing the first part of the second paragraph preceding subparagraph “(1)” to read as follows:

During the calendar year 1943 and any calendar year thereafter, section 1000 (c) as added by the Revenue Act of 1942, applies, subject, however, to section 452 (c) of such Act, as amended by section 505 of the Revenue Act of 1943. That is, during such years an exercise or release of a power of appointment (other than a release prior to January 1, 1945 of a power of appointment created on or before October 21, 1942) without an adequate and full consideration in money or money's worth (including a power to appoint exercisable in conjunction with an-

Exhibit No. 1 (13)—(Continued)

other person) constitutes a gift by the individual possessing such power, except in the case of the following:

(C) By striking out "March 1, 1944, wherever it appears in subparagraph "(3)" of the second paragraph and in the next to the last paragraph, and by inserting in lieu thereof "January 1, 1945."

Par. 3. Section 86.3 is amended by changing the last paragraph to read as follows:

Section 1000 (e), as added by section 502 of the Revenue Act of 1943, provides in the case of property transferred in trust before January 1, 1939, under which the grantor, on and after such date, retained no power to revest title to such property in himself, exercisable by the grantor alone or in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, that the relinquishment by the grantor on or after January 1, 1940 and prior to January 1, 1945, by an exercise or other termination, of a power to change the disposition of the trust property, which completes the gift thereof, shall not be treated as a gift for the purposes of the gift tax statute. However, if the property had been transferred in trust without the grantor retaining power to revest title to the property in himself, or if such power previously retained had been relinquished, while a Federal gift tax statute was in effect, the exemption provided by section 1000 (e) shall apply only if (1) gift tax had been paid with respect to such prior transfer or relin-

Exhibit No. 1 (13)—(Continued)

quishment, and not credited or refunded, or a gift tax return had been filed within the time prescribed on account of such prior transfer or relinquishment but no gift tax paid because of deductions or exclusions claimed on such return, and (2) the grantor agrees in writing to continue to treat such prior transfer or relinquishment as completing the gift for all purposes of the gift tax statute except as hereinafter indicated with respect to income. Upon submission of such written agreement, the Commissioner may make any necessary redetermination of the amount of the net gifts for such prior year, and, unless assessment is barred by statutory limitations or rule of law, assert any resulting deficiency tax. The exemption provided by section 1000 (e) shall not apply to any payment or other disposition of income while the grantor retains the power of disposition of the future income from the trust property. For example, if a donor created a trust in 1930, reserving a power to change the beneficiaries and their proportionate interests with respect to principal and income, but without retaining the power to revest the property in himself, and terminates his reserved power in 1944, so that he is no longer able to change the beneficiaries or their respective interests, the interim payment of income to any beneficiary or other surrender by the donor of control over such income prior to such termination is nevertheless a taxable gift and to be treated accordingly. The same result follows if a similar trust was created while a gift tax law was in effect and the

Exhibit No. 1 (13)—(Continued)

donor, prior to January 1, 1945, terminates the afore-said reserved power, consenting to treat the original transfer in trust in the calendar year in which effected and for all periods thereafter as having been a transfer subject to gift tax. No interest shall be allowed or paid on any overpayment resulting from the application of the exemption provided by section 1000 (e).

(This Treasury decision is issued under the authority contained in sections 1000, 1029 and 3791 of the Internal Revenue Code (53 Stat. 144, 157, 487; 26 U.S.C. 1000, 1029, 3791), and sections 502 and 505 of the Revenue Act of 1943 (Public Law 235, 78th Congress), enacted February 25, 1944.)

GEO. J. SCHOENEMAN,

Acting Commissioner of Internal
Revenue.

Approved: May 5, 1944.

JOHN L. SULLIVAN,

Acting Secretary of the Treasury

(Filed with the Division of the Federal Register
May 6, 1944, 10:18 a.m.)

[Endorsed]: Filed Oct. 5, 1950.

[Title of District Court and Cause.]

OPINION OF THE COURT

1. Introduction.

This case presents three questions of law, two of them involving difficult if not abstruse problems relating to the taxability, as gifts, of the relinquishment of certain powers reserved by the settlors of a discretionary trust.

Specifically, the questions are as follows:

1. Is the Commissioner of Internal Revenue barred from reviewing the fair market value of corporate stock, a gift of which was made by the taxpayer in years more than three years prior to assessment, and assessing a deficiency in the current year based upon the alleged under-valuation of such stock?

2. Does the relinquishment by the taxpayer of his discretionary power or control over the distribution of the property comprising a trust settled in 1935 constitute a non-taxable transfer of property within the "amnesty" offered by the Revenue Act of 1943?

3. Does the relinquishment by the taxpayer of his discretionary power or control over the disposition of the property comprising such 1935 trust constitute, in respect of the alleged power of appointment of which the taxpayer was the donee and the wife of the taxpayer the donor, a non-taxable "release" of the power of appointment within the provisions of the Revenue Act of 1942?

2. The Facts.

On September 8, 1931, the plaintiff and his wife created three trusts, in identically the same form, *mutatis mutandis*, in each of which the Hawaiian Trust Company, Ltd., is trustee, and one of the three adult children of the settlors is the beneficiary.

On May 28, 1935, the same settlors created another trust, with the same trustee, with themselves as

beneficiaries for their joint lives and the survivor of them, remainder to such persons and in such estates as the survivor might by his or her last will appoint; and, in default of such appointment, to the trustee of the trusts of 1931, for the beneficiaries of the latter trusts, in equal shares.

Shares of stock constituted the corpus of each trust. The stock conveyed in trust by the 1935 indenture was in the name of the plaintiff and his wife "as joint tenants with right of survivorship and not as tenants in common".

Each of the four trusts reserved to the settlors and the survivor of them the right "from time to time to change, modify or amend the provisions of this trust deed but not to revoke the same or to so change it that they or either of them will receive back any of the trust estate".

The wife of the taxpayer died on January 8, 1942.

On December 31, 1943, the plaintiff taxpayer, as the surviving settlor of the 1931 trusts, amended those indentures in several particulars, one of them being the irrevocable release and extinguishment by him of the right of the surviving settlor "to shift or to effect a partial or complete alteration of the economic benefits" of the 1931 trusts, thus modifying the original provisions reserving to the settlors the right of amendment within certain limits, as stated above.

On January 1, 1944, and on October 25, 1944, the plaintiff, as the surviving settlor of the 1935 trust,

amended that indenture by incorporating therein directions to the trustee to transfer to itself as trustee under the three indentures of 1931, certain personal property, including cash, included in the trust estate of 1935. Thus there was distributed to the Hawaiian Trust Company, Ltd., as trustee under the 1931 trusts, the remaining trust principal subject to the 1935 trust and all unapplied income therefrom, thereby conveying to the ultimate takers in default and anticipating what would have occurred under the provisions of the 1935 trust, *supra*, had the surviving settlor failed to exercise the power of appointment by will.

On October 26, 1944, the indenture of May 28, 1935, was canceled by the mutual consent of the plaintiff and the trustee.

In compliance with the provisions of Section 507 of the Revenue Act of 1932, as amended, the plaintiff and his wife made separate returns of the transfers by gift made by them in the calendar year of 1935 by the creation of the 1935 trust. The plaintiff asserts that "they assumed upon administrative practice Gift Tax Regulation 79, Art. 3, * * * and E.T. 6, C.B. XIV-1, 1935, p. 381, * * *, that the gifts affected (*sic*) by the indenture of trust of May 28, 1935, were complete." The plaintiff returned the sum of \$41,736.87 as the amount of gifts for the year "other than charitable, etc.", and his wife reported the sum of \$27,370.35. Both claimed their respective amounts as specific exemptions, and therefore paid no tax thereon.

In computing his tax liability for 1943, the plaintiff employed the net gifts reported by him for 1935 as a part of the aggregate sum of net gifts made by him since June 6, 1932, the date on which the Revenue Act of 1932 was passed. In that aggregate sum was included gifts made by the taxpayer in 1933. On September 8, 1931, the date of the creation of the first trusts involved in this case, gifts were not subject to Federal tax. The plaintiff paid a tax according to the above method of computation.

The Commissioner, on the other hand, in assessing the plaintiff's tax liability for 1943, declined to accept the valuation of the stock of the Pineapple Holding Company, Ltd., placed by the plaintiff, and as reported by him in his 1935 return. The Commissioner determined that the fair market value of the stock at the time of the gift—May 28, 1935—was \$17.125 a share, increased the amount of net gifts of previous years by the amount of the alleged undervaluation, and found a deficiency in the tax liability of the plaintiff for the year 1943. On October 10, 1947, the plaintiff paid the alleged deficiency, amounting to \$52.71, with interest amounting to \$10.89.

For the calendar year of 1944, the plaintiff, pursuant to the provisions of Section 1006 of the Internal Revenue Code, made a return of all transfers by gift made by him during that year. He reported the amendments of the trust indenture of May 28, 1935, effected January 1, 1944, and October 25, 1944, and the cancellation of the trust by the indenture of

October 26, 1944, as a relinquishment by him of power or control with respect to the distribution of the property subject to that trust, as well as the income therefrom. He reported those amendments and that cancellation as the exercise and termination of such power and control, reserved to the settlors and the survivor of them by the provisions of the 1935 trust, as non-taxable for gift-tax purposes. The plaintiff also, on March 7, 1945, prepared in writing and filed with the Commissioner his consent to treat such relinquishment in the calendar year in which effected and for all periods thereafter as having been a transfer of property subject to tax under the provisions of the gift-tax law.

On September 17, 1947, the Commissioner determined a deficiency in the plaintiff's gift taxes for the calendar year of 1944, in the sum of \$7,908.37. The theory of the Commissioner's action was that the plaintiff was the grantor of the trust property within the meaning of Section 1000 (e) of the Internal Revenue Code, *infra*, only to the extent of the one-half of the corpus of the trust attributable to the property transferred to it by the taxpayer, and that therefore the release was non-taxable only to the extent of one-half of the value of the trust property; and that the one-half attributable to the property transferred to the trust by his wife was consequently taxable under Section 1000 (e) of the Internal Revenue Code, *infra*.

The deficiency, in the sum of \$7,908.37, with interest of \$1,259.59, was paid by the plaintiff on November 10, 1947.

The plaintiff seeks judgment for \$63.60 on the first cause of action, based upon the payment of the 1943 deficiency, and for \$9,167.96 on the second cause of action, based upon the payment of the 1944 deficiency.

3. As to the First Cause of Action: The Commissioner Is Not Barred by the Statute of Limitations From Reviewing the Fair Market Value of Corporate Stock.

No evidence whatever was submitted as to the fair market value of the 5,355 shares of stock of the Pineapple Holding Company, Ltd., which forms the major part of the 1935 trust corpus. The plaintiff contends that under the provisions of Section 1016 (a) of the Internal Revenue Code, which require that the assessment of a gift tax shall be made, or its collection begun, within three years after the return is filed, the Commissioner was barred in 1947 from reviewing the fair market value of the corporate stock in question. The plaintiff asserts that the fair market value of the stock in 1935 is purely a question of fact and that there is an important distinction between questions of law and questions of fact in determining the "true and correct aggregate" of net gifts of previous years, as recognized in *Wintorbotham vs. Commissioner*, U.S. B.T. Apps. 972, 978.

The plaintiff contends that it could not have been the intention of the Supreme Court in *Commissioner vs. Disston* 325 U.S. 442, to construe the statute so that the question of the fair market value of a gift

could hang undetermined over the head of a taxpayer during the remainder of his life should he desire to make an additional gift prior to his death.

There is merit to much of plaintiff's argument on this question, but the words of the *Disston* case compel a decision against plaintiff.

A part of the *Commissioner v. Disston* case, at p. 449, is quoted, following:

"The question remains whether the adjustment of net gifts for 1936 in computing 1937 and 1938 tax liability is barred by the statute of limitations. As has been noted, Section 502 requires utilization of 'the aggregate sum of the net gifts for each of the preceding calendar years' in the formula for computing gift tax liability. Section 517 (a) does not purport to bar adjustment of the net gift figure for that purpose, but simply prevents assessments and collection of a tax for a year barred by the statute. The statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining gift tax liability for years which are still open. The Tax Court and Treasury Regulations have construed Section 517 (a) as requiring determination of the true and correct aggregate of net gifts for previous years. The construction is in accord with the statutory language."

The relevant language of Section 502 of the Revenue Act of 1932, to which the Supreme Court refers in the foregoing excerpt, has been carried over verbatim into Section 1001 (a) (1) of the Internal Rev-

enue Code. Section 517 (a) of the Revenue Act of 1932 is the same as Section 1016 (a), *supra*, of the Internal Revenue Code.

4. The Relinquishment by the Taxpayer of His Discretionary Control Over the Distribution of the Property Comprising the 1935 Trust Was Non-taxable Only to the Extent of His Own Moiety Interest in Such Property.

The second cause of action, however, presents greater difficulty. It involves the abstract and somewhat elusive problem of whether the relinquishment by the taxpayer of his discretionary power or control over the distribution of property comprising the 1935 trust, constitutes a non-taxable transfer of property or, in any event, a non-taxable "release" of a power of appointment.

According to the plaintiff's theory of the second cause of action, two "questions emerge and are posed for the decision of the court." The propositions to which the plaintiff refers constitute the last two points listed in the Introduction to this memorandum. They will be dealt with *seriatim* herein.

(a) The Corpus of the 1935 Trust Was Not Held in Entirety.

It will be remembered that in 1944, the plaintiff, as the surviving settlor of the 1935 trust, amended that indenture by incorporating therein directions to the trustee to transfer to itself as trustee under the three indentures of trust of 1931, all the property, including cash, comprising the 1935 trust estate.

It will also be remembered that, December 31, 1943, the taxpayer had amended the 1931 trusts so as to release and extinguish irrevocably the right of the surviving settlor to shift or effect a partial or complete alteration of the economic benefits of the 1931 trusts. It follows, therefore, that in the transfer of the corpus of the 1935 trust to the trustee of the 1931 trusts, to be held by it under the terms of the latter trusts, the relinquishment of December 31, 1943, automatically applied also to the property that had formerly constituted the estate of the 1935 trust.

The plaintiff takes the position that the amendments of the trust indenture of 1935, effected by him in 1944, "constituted a relinquishment by him as one of the grantors in the indenture of May 28, 1935, of power or control with respect to the distribution of the property in the trust created prior to January 1, 1939, and the income therefrom, by an exercise and termination of such power or control within the exceptions of Sections 502 (a) and 502 (b) of the Revenue Act of 1943 (Internal Revenue Code, Section 1000 (e) and Section 501 (c) of the Revenue Act of 1932)". He further contends "that the deficiency assessed was erroneous upon the grounds: (a) That the settlors immediately prior to the creation of the 1935 trust were owners by the entirety of the property conveyed in trust; (b) that by the terms of the trust there was reserved to the survivor of the settlors as beneficiaries in equity, the same rights of survivorship in the trust res that he and she had theretofore enjoyed at law as tenants by the entirety, except for the inhibition against

revesting; (c) that the exercise by the taxpayer of the power or control over the distribution of the remaining trust res was effected by him as a principal and not as a principal of a moiety and an appointee of a moiety; and (d) that at the time of such exercise by him of the power or control over the distribution of the remaining trust res he was a 'grantor' within the meaning of that term as employed in Sections 502 (a) and 502 (b) of the Revenue Act of 1943." (Emphasis supplied).

The defendant, on the other hand, maintains that:

"As the taxpayer was the donor of only one-half of the property in the trust, Section 1000 (e) of the Internal Revenue Code * * * applies only to the one-half that he gave and not to the one-half that was given by his wife.

"Since the trust was not within any of the exceptions enumerated in Section 1000 (c) of the Internal Revenue Code * * *, the one-half of the corpus attributable to the wife's contribution was properly taxed." (Emphasis supplied.)

As to this phase of the case, therefore, both parties rely upon Section 1000 (e). In addition, they both make passing reference to Section 1000 (c), which, however, has greater relevancy to the topic dealt with in the next succeeding subdivision of this memorandum. The text of those two subsections follows:

“Section 1000. Imposition of tax.

“(c) Powers of appointment. An exercise or release of a power of appointment shall be deemed a transfer of property by the individual possessing such power. For the purposes of this subsection the term ‘power of appointment’ means any power to appoint exercisable by an individual either alone or in conjunction with any person, except—

“(1) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants (other than such individual) of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004 (a) (2) and donees described in section 1004 (b). As used in this paragraph, the term ‘descendant’ includes adopted and illegitimate descendants, and the term ‘spouse’ includes former spouse; and

“(2) a power to appoint within a restricted class if such individual did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of such individual, his estate, his creditors, or the creditors of his estate. If a power to appoint is exercised by creating another power to appoint, such first power shall not be considered except under paragraph (1) or (2) from the definition of power of appointment to the extent of the value of the property subject to such

second power to appoint. For the purposes of the preceding sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint.

* * * * *

“(e) Certain discretionary trusts. In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1940, and on or before December 31, 1947 (or on a later date in any case where it is shown to the satisfaction of the Commissioner, in accordance with regulations prescribed by him with the approval of the Secretary, that failure to relinquish prior to such later date was for reasonable cause) of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this chapter. If such property was transferred in trust, the grantor not retaining such power to revest title thereto in himself, or if such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with

respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this chapter to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this chapter. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property.”

The plaintiff contends that at the time of his exercise of the reserved power or control with respect to the distribution of the trust property, he was a “grantor”, within the meaning of Section 1000 (e). He further asserts that he and his wife were “tenants by the entirety” of the trust property, and that they reserved to themselves, as beneficiaries of equitable estates, the same power or control with respect to the distribution of the property as had been previously possessed by them at law as tenants by the entirety, except for the inhibition against revesting. As tenants by the entirety, he maintains, each of the settlors was possessed in his and her own right of the whole; “the entirety”. Ergo, runs the argu-

ment, the plaintiff, in exercising the reserved power in question, acted by virtue of the power reserved to him as a principal, and not by virtue of any power delegated to him by his wife.

The defendant complains that the plaintiff has cited no case which holds that there can be, under the law of Hawaii, a tenancy by the entirety of personal property. At the outset, however, and for the purposes of this case, we may assume to be correct the plaintiff's assertion, in his reply brief, that "At common law by analogy to realty an estate by the entirety could be created in personalty". In addition to the many decisions cited by plaintiff, there is considerable additional authority to the same effect. See the copious collection of cases in 8 A.L.R. 1017-1022.

Our specific task, however, is to ascertain whether, under the law of Hawaii and under the facts of this case, the plaintiff was a "grantor" within the purview of Section 1000 (e).

As the plaintiff points out, the word "grantor" is not defined in the statute, and therefore should be given its "natural, ordinary and familiar meaning, except as limited or restricted by the context." *Rice vs. Railroad Company*, 66 U.S. 358, 378; *DeGanay vs. Lederer*, 250 U.S. 376, 381.

In *Buhl vs. Kavanagh*, 6 Cir., 118 F. 2d 315, 320, "the decisive question" was, as here, "whether appellant was the grantor of the present trust". The Court said:

"The word 'grantor' is not defined in the statutes, and therefore is to be given its natural, ordinary and familiar meaning. (Case cited.) Putting the word

in its ordinary setting, it means the person who establishes the trust or its donor, creator or founder.”

See also *Rollins vs. Helvering*, 8 Cir., 92 F. 2d 390, 392-393, certiorari denied, 302 U.S. 763; *MacManus vs. Commissioner of Internal Revenue*, 6 Cir., 131 F. 2d 670, 673.

Applying the foregoing principles to the facts at bar, we find that there were two grantors of the 1935 trust; namely, the plaintiff and his wife. The fact that she died before the relinquishments of 1944 took place does not militate against her being the grantor of one-half of the trust created in 1935. Subsequent events could not change her status as to that fact. Her status as joint grantor of the trust was frozen on May 28, 1935. Had she died on the following day, she still would have been the grantor of her moiety.

Nor is the legal situation altered by the fact that, in the plaintiff's own language, “by the terms of the trust there was reserved to the survivor of the settlers as beneficiaries in equity, the same rights of survivorship in the trust res that he and she had theretofore enjoyed at law as tenants by the entirety,” etc. We are here concerned not with ownership, but with grant. Though, according to the stipulation of facts, the plaintiff, as “joint tenant” of the stock in question, “with right of survivorship”, at his wife's death became the sole owner of the settlers' equitable estate in the 1935 trust, the stubborn fact remains that, from 1935 to the present day, he has been the grantor of only one-half of that trust.

The plaintiff seeks to avoid the effect of this logic

by contending that "a conveyance to husband and wife in joint tenancy would create an estate by the entirety". To support this contention, the plaintiff invokes the principles of the common law, which he assert have been adopted in Hawaii in this respect.

It therefore now becomes necessary to inquire whether, in the contemplation of Hawaiian law, the plaintiff's "tenancy" of the stock was by the entirety.

I. In Hawaii, the Terms of the Grant Determine the Question of Joint Tenancy Vel Non.

As we have seen, it has been stipulated in this case that the stock conveyed by the trust indenture of May 28, 1935, was, until transferred to the name of the trustee, in the name of the plaintiff and his wife "as joint tenants with right of survivorship and not as tenants in common". In Hawaii, such a stipulation is conclusive.

Section 3190 of the Revised Laws of Hawaii of 1925 was as follows:

"Conveyances to two or more. All grants, conveyances and devises of land, or of any interest therein, made to two or more persons, shall be construed to create estates in common and not in joint-tenancy or by entirety, unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint-tenancy or by entirety, provided, however, that the foregoing provisions shall not apply to grants, conveyances or devises to executors or trustees."

This provision was carried over into the 1935 compilation as Section 5180, and into the 1945 code as Section 12780.

It should be observed in passing, that the proviso in the section does not apply to the instant case, since we are not here concerned with the title of the trustee but of the trustors.

The Hawaii rule accords with general law. See 161 A.L.R. 464-465.

II. The Common Law Doctrine of the Unity of Husband and Wife No Longer Prevails in Hawaii.

In his reply brief, the plaintiff says:

“The tenancy by the entirety is founded on the common-law doctrine of the unity of husband and wife as constituting in law but one person; and that is basis for the adoption of the principles of the tenancy in Hawaii.”

In the opinion of this Court, the learned plaintiff has here fallen into grave error, so far as the law of Hawaii is concerned.

In *First National Bank of Hawaii vs. Gaines*, 16 Haw. 731, 732-733, the Court said:

“The statutory capacity of a married woman to take, hold and receive property to her separate use is inconsistent with the common law fiction of the unity of husband and wife as well as with the former statute giving the husband by virtue of marriage his wife’s personal property. The relations between husband and wife unless as affected by the statute of 1892 on the subject of the common law are statu-

tory in the law of Hawaii. 'As the laws have destroyed this unity the incidents or consequences of the unity ought not to operate.''' (Emphasis supplied.)

Indeed, even with regard to other jurisdictions, where the archaic concept of the oneness of husband and wife does survive, the Supreme Court of the United States has frowned upon the application of the ancient doctrine to tax problems.

In *Tyler vs. United States*, 281 U.S. 497, 503, the Court said:

"According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." (Emphasis supplied.)

III. Hawaiian Statutes Have Sedulously Recognized the Separateness of a Tenancy by the Entirety from a Joint Tenancy.

The language of Section 3190 of the Revised Laws of 1925, *supra*, and that of its successors, clearly shows that the various legislatures of Hawaii have carefully observed the distinction between tenancy of the entirety and joint tenancy. There is certainly

no suggestion that, as the plaintiff contends in his reply brief, "a conveyance to husband and wife in joint tenancy would create an estate by the entirety."

The matter, however, is put beyond cavil by Act 11 of the Session Laws of Hawaii of the Special Session of 1933. The closing sentences of this statute, which dealt with the inheritance tax, are significant:

"As hereafter modified this paragraph shall apply to tenancies by the entirety as well as to joint tenancies. Provided, however, that where such property is held in the joint names of a husband and wife, whether as joint tenants or as tenants by the entirety, only an undivided one-half of the property shall be deemed transferred and taxable under the provisions of this chapter." (Emphasis supplied.)

The foregoing provisions were carried over almost verbatim into Section 2060 of the Revised Laws of 1935 and into Section 5553 of the Revised Laws of 1945.

The expression "whether as joint tenants or as tenants by the entirety", as used in the cited statute, would be meaningless if, as the plaintiff contends, a conveyance to husband and wife in one tenancy would create an estate in the other.

As we read the Hawaiian statutes, all three tenancies are recognized in this territory. If the grant is silent or ambiguous as to the type of tenancy, an estate in common shall be presumed. If a joint ten-

ancy is specified, an estate in joint tenancy is created. If a tenancy by the entirety is spelled out, the terms of such a grant, too, will be respected. Nowhere in the Hawaiian statutes or in Hawaiian jurisprudence is there any suggestion that the terms "joint tenancy" and "tenancy by the entirety", where husband and wife are concerned, are interchangeable.

The cases cited by the plaintiff in support of his contention were either the expressions of courts sitting in other jurisdictions, or were handed down in Hawaii long before the decision in the Gaines case, *supra*, and long before the enactment of the statutes to which we have just referred. The authorities relied upon by the plaintiff do not reflect the present state of the Hawaiian law.

Accordingly, this Court holds that the plaintiff was the grantor of only one-half of the stock, within the meaning of that term as it is employed in Section 502 (a) and (b) of the Revenue Act of 1943, (Section 1000 (e) of the Internal Revenue Code).

(b) The Plaintiff Is Estopped from Claiming That He Is the Grantor of the Entire Trust.

The plaintiff concedes that "The taxpayer and his wife pursuant to and in compliance with the provisions of Section 507 of the Revenue Act of 1932, as amended, made separate returns of the transfers by gift made by them in the calendar year 1935 by the creation of the 1935 trust". He also concedes that he and his wife each claimed the full amount of their respective gift totals as specific ex-

emptions, with the result no tax liability was incurred. Had the taxpayer reported himself as being the sole grantor of the trust, he would have had to pay a gift tax, since the maximum "specific exemption" of \$50,000, "less (the) total amount of specific exemption claimed for preceding years", would not have then absorbed the entire amount of his gifts for 1935.

The plaintiff does not deny these facts, but asserts that "There is nothing inconsistent in construing one's legal position under certain statutes or regulations one way, and construing it under other statutes another way". He adds that "there is no showing that the Bureau took any position to its prejudice by reason of the separate returns made and the separate claims of full exemption".

This Court cannot agree with the plaintiff's reasoning. If the plaintiff was the grantor of the entire trust in 1944, he was so in 1935. It can hardly be said that the Commissioner's position was not prejudiced by the fact that the plaintiff and his wife filed separate gift tax returns in 1935, as a result of which neither paid any gift tax whatsoever, whereas the plaintiff would have been liable for a tax had he held himself as the sole grantor of the trust.

In *Stearns Co. vs. United States*, 291 U.S. 54, 61-62, Mr. Justice Cardozo said:

"The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says

you are not damnified' ". (Cases cited.) Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little."

5. The Plaintiff Effected a Non-Taxable Relinquishment of His Control Over His Deceased Wife's Moiety Interest in the Trust Property, By Virtue of Section 452 (c) of the Revenue Act of 1942.

We advert, finally to Point II urged in support of the plaintiff's second cause of action. This point is fully stated as "Question 3" in the Introduction to this memorandum opinion.

Point II is based upon the following subsection of Section 452 of the Revenue Act of 1942:

"(c) Release on or before January 1, 1943.

"(1) A release of a power to appoint before January 1, 1943, shall not be deemed a transfer of property by the individual possessing such power.

"(2) This subsection shall apply to all calendar years prior to 1943."

The defendant concedes that the period has been enlarged by subsequent amendments to January 1, 1951.

The defendant contends, however, that the plaintiff "never" released his power to alter, modify or change the 1935 trust. On the contrary, it is argued, the plaintiff exercised that power by transferring the assets of that trust to the three 1931 trusts. As

to the plaintiff's one-half interest in the property, the Commissioner concedes that such an "exercise" was "the equivalent of a relinquishment of the power", and therefore non-taxable. Section 1000 (e), *supra*, refers, it will be remembered, to the grantor's "exercise or other termination" of such power. That subsection applies only to a grantor. Only when an "exercise" of power is effected by a grantor can it be equivalent to a "relinquishment".

But, the defendant insists—and, as we have seen, correctly—the plaintiff is the grantor of only one-half of the trust. Therefore, it is argued, as to his deceased wife's moiety, the plaintiff's transfer of the 1935 trust corpus to the 1931 trusts did not amount to a "relinquishment", but was an "exercise" of the power and therefore, of course, taxable; for the amnesty of Section 452 (c) applies only to releases, and not to exercises.

The difficulty with the defendant's argument, however, is that it overlooks the fact that Section 452 (c) is not limited in its amnesty to grantors only, as is Section 1000 (e). It applies to any "individual possessing such power (to appoint)." Now, there is no question that, as original owner of one moiety interest, and as surviving owner of the other moiety interest in the trust estate, it is clear that the plaintiff possessed the power. Otherwise, the defendant's entire argument that the plaintiff "exercised" instead of "relinquishing" the power would be meaningless. If the plaintiff "exercised" the power, such "exercise" is taxable as to his wife's moiety, since the amnesty of Section 452 (c) *supra*, applies only

to "release"; i.e., relinquishment, and since that section, unlike 1000 (e), does not make "exercise" equivalent to "relinquishment".

We therefore advance to the fundamental question under Point II; i.e., whether the transfer of the 1935 trust assets to the 1931 trusts was in fact a relinquishment of the plaintiff's power "to change, modify or amend" the provisions of the 1935 trust instrument.

Elsewhere in this memorandum opinion, this Court has already indicated that, when in 1944, the plaintiff transferred the corpus of the 1935 trust to the trustee of the 1931 trusts, to be held by it under the terms of the latter trusts, he automatically subjected the 1935 trust property to the restrictions theretofore placed upon the 1931 trusts by the document of December 31, 1943. Among those restrictions was the irrevocable release and extinguishment of "the right in the surviving settlor to shift or to effect a partial or complete alteration of the economic benefits", etc.

Little need be here added to this statement. The plaintiff, of course, could have formally relinquished his right to amend the 1935 trust in one instrument, and then, immediately thereafter, in another instrument, he could have transferred the assets of the 1935 trust into the 1931 trusts. But the law—including the tax law—does not require a man to do a vain and useless thing. By transferring the 1935 trust into the 1931 immutable trusts, the plaintiff made the 1935 trust likewise immutable. In such

matters, "we must regard matters of substance and not mere form". *Weiss vs. Stearn*, 265 U.S. 242, 254; *United States vs. Phellis*, 257 U.S. 156, 168; *Ingle Coal Corporation vs. Commissioner*, 7 Cir., 174 F. 2d 569, 571.

6. Conclusion.

The plaintiff is concededly exempt from a gift tax on the transfers, in 1944, of the 1935 trust-corpus into the 1931 trusts, so far as his moiety interest in the former is concerned. And since, as we have just seen, his relinquishment of the power to amend, in so far as his deceased wife's interest in the 1935 trust property is involved, comes under the "amnesty" of Section 452 (c), *supra*, he is not taxable on the 1944 transfers at all. He must therefore prevail in his second cause of action.

Accordingly, judgment should be entered for the defendant and against the plaintiff on the first cause of action, and in favor of the plaintiff and against the defendant on the second cause of action.

Dated at Honolulu, Hawaii, this 23rd day of February, 1951.

/s/ DELBERT E. METZGER,
Judge.

[Endorsed] Filed February 23, 1951.

In the United States District Court
for the District of Hawaii

Civil No. 935

EMIL C. PETERS,

Plaintiff,

vs.

JAMES M. ALSUP, Individually, and as United
States Collector of Internal Revenue for the
District of Hawaii,

Defendant.

JUDGMENT

This cause came on to be heard October 5, 1950, upon the pleadings and stipulation of facts of the parties and was submitted to the court without a jury upon briefs.

This cause is a consolidation of two separate causes of action at law for the restitution of the overpayment of United States gift taxes illegally exacted and statutory interest thereon from date of payment to wit: the first, for the restitution of the United States gift tax illegally exacted for the calendar year 1943 in the sum of Fifty-two Dollars and Seventy-one Cents (\$52.71) with interest in the sum of Ten Dollars and Eighty-nine Cents (\$10.89), the aggregate of which or the sum of Sixty-three Dollars and Sixty Cents (\$63.60) was paid October 10, 1947; the second, for the restitution of United States gift tax illegally exacted for the calendar year 1944 in the sum of Seven Thousand Nine Hundred and Eight Dollars and Thirty-seven Cents (\$7,908.37) with interest in the sum of One Thousand Two

Hundred and Fifty-nine Dollars and Fifty-nine Cents (\$1,259.59), the aggregate of which or the sum of Nine Thousand One Hundred and Sixty-seven Dollars and Ninety-six Cents (\$9,167.96) was paid November 10, 1947.

The opinion of the court upon the merits was filed February 23, 1951.

Pursuant to the opinion of the court:

It Is Hereby Ordered and adjudged that plaintiff take nothing by his first cause of action and it be and the same is hereby dismissed; that upon his second cause of action plaintiff have and recover of the defendant individually and as United States Collector of Internal Revenue for the District of Hawaii the full amount prayed, to wit, the sum of Nine Thousand One Hundred and Sixty-seven Dollars and Ninety-six Cents (\$9,167.96) with interest at six per cent (6%) per annum upon said principal sum of \$9,167.96 from November 10, 1947, and his costs of the within action heretofore taxed in the sum of Two Hundred Thirty-nine Dollars and Eighteen Cents (\$239.18).

Dated: March 19, 1951.

By the Court

/s/ WM. F. THOMPSON, JR.,
Clerk.

The within judgment may be entered.

Dated: March 19, 1951.

/s/ D. E. METZGER,
Judge, United States District Court for the District
of Hawaii, presiding.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Please take notice that James M. Alsup, the defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Judicial Circuit from so much of the final judgment entered herein on the 19th day of March, 1951, as is adverse to the said defendant and in favor of the plaintiff above-named.

/s/ HOWARD K. HODDICK,
United States Attorney.

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated between the parties hereto that the following documents and records shall be included in the record on appeal:

1. Complaint filed September 7, 1949.
2. Answer filed January 13, 1950.
3. Stipulation of Facts (and exhibits attached) filed October 5, 1950.
4. Clerk's Minutes of October 5, 1950, in the above-entitled cause.

5. Opinion of the Court filed February 23, 1951.
6. Judgment filed March 19, 1951.
7. Certificate of Probable Cause filed March 19, 1951.
8. Notice of Appeal filed May 4, 1951.
9. Letter of Clerk to Plaintiff dated May 4, 1951.
10. Statement by Appellant of Points to be relied upon on appeal.
11. Stipulation as to Record.

Dated: Honolulu, T. H., this 21st day of May, 1951.

/s/ E. C. PETERS,
Plaintiff in Person.

HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii,
Attorney for Defendant,

/s/ By WINSTON C. INGMAN,
Assistant United States Attorney
District of Hawaii

[Endorsed]: Filed May 21, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings of record in said cause:

Complaint.

Answer.

Stipulation of Facts.

Opinion of the Court.

Judgment.

Certificate of Probable Cause.

Notice of Appeal.

Stipulation as to Record.

I further certify that included in said record on appeal is a copy of the Minutes of Court of October 5, 1950, and a copy of the letter of May 4, 1951.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Endorsed]: No. 12972. United States Court of Appeals for the Ninth Circuit. James M. Alsup, Individually, and as United States Collector of Internal Revenue for the District of Hawaii, Appellant, vs. Emil C. Peters, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: June 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12972

EMIL C. PETERS,

Plaintiff-Appellee,

vs.

JAMES M. ALSUP, Individually, and as United
States Collector of Internal Revenue for the
District of Hawaii,

Defendant-Appellant.

STATEMENT BY DEFENDANT-APPELLANT
OF POINTS TO BE RELIED UPON
ON APPEAL

Comes now James M. Alsup, defendant-appellant above named, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and pursuant to the provisions of Rule 19(6) of the Rules of Practice of the United States Court of Appeals

for the Ninth Circuit, hereby states that the defendant-appellant in taking this appeal relies upon the following points:

1. The entry of judgment for the plaintiff and against the defendant on plaintiff's second cause of action was in error in the following respect:

(a) The court erred in holding that the plaintiff effected a non-taxable relinquishment of his control over his deceased wife's moiety interest in the trust property by virtue of Section 452(c) of the Revenue Act of 1942.

Dated at Honolulu, T. H., this 15th day of May, 1951.

HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii,

/s/ By WINSTON C. INGMAN,
Assistant United States Attorney,
District of Hawaii.

Acknowledgment of Receipt attached.

[Endorsed]: Filed June 11, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Comes now James M. Alsup, defendant-appellant above named, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and

hereby designates for inclusion in the printed record on appeal, the following:

1. Complaint filed September 7, 1949.
2. Answer filed January 13, 1950.
3. Stipulation of Facts (and exhibits attached) filed October 5, 1950.
4. Opinion of the Court filed February 23, 1951.
5. Judgment filed March 19, 1951.
6. Notice of Appeal filed May 4, 1951.
7. Statement by Appellant of Points to be Relied upon on Appeal.
8. Stipulation as to Record.
9. Certificate of Clerk.
10. This Designation of Record to be Printed on Appeal.

Dated: Honolulu, T. H., this 22nd day of May, 1951.

HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii,

/s/ By WINSTON C. INGMAN,
Assistant United States Attorney,
District of Hawaii.

Acknowledgment of Receipt attached.

[Endorsed]: Filed June 11, 1951. Paul P. O'Brien,
Clerk.

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

No. 12973

United States
Court of Appeals
for the Ninth Circuit.

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

FILED
AUG 17 1935
U.S. DEPT. OF JUSTICE
RECORDS SECTION

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	16
Appearances	1
Certificate of Clerk	194
Decision	191
Deposition of Searles, Eldon E.	129
—direct	131
—cross	140
—redirect	161
—recross	165
Docket Entries	3
Findings of Fact and Opinion	171
Findings of Fact	172
Opinion	184
Petition	5
Ex. A—Notice of Deficiency	9
Petition for Review	191
Statement of Points Relied on by Petitioner...	196
Stipulation of Facts	18
Ex. No. 1—Partnership Agreement	26
2—Sale and Lease Agreement ...	30

INDEX	PAGE
3—List of Rentals Paid by Shaffer Terminals, Inc. on Account of Leased Equipment..	33
4—Summary of Partner's Investments and Withdrawals	35
A—Income Tax Return for 1944	38
B—Income Tax Return for 1945	56
C—Income Tax Return for 1946	70
D—Partnership Return of Income for 1944	76
E—Partnership Return of Income for 1945	78
F—Partnership Return of Income for 1946	81
G—Partnership Return of Income for 1947	85
Stipulation to Take Deposition	127
Transcript of Hearing	89
Witnesses:	
Kennell, K. M.	
—direct	98
—cross	105
—redirect	116
Stocking, Samuel B.	
—direct	117
—cross	119

APPEARANCES

For Petitioner :

SCOTT Z. HENDERSON, ESQ.,

GEORGE J. BUSCH, C.P.A.,

HENRY C. PERKINS, ESQ.

For Respondent :

JOHN D. PICCO, ESQ.

In the Tax Court of the United States

Docket No. 26127

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1949

Dec. 12—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 14—Copy of petition served on General Counsel.

Dec. 27—Request for hearing Tacoma or Seattle, Washington filed by taxpayer. Granted 12/28/49.

1950

Feb. 8—Answer filed by respondent.

Feb. 13—Copy of answer served on Taxpayer. Seattle, Washington.

May 3—Hearing set July 3, 1950, Seattle.

June 19—Notice changing hearing to July 5, 1950, in Seattle, Washington, filed.

July 5—Hearing had before Judge Johnson on merits. Record to be held open pending receipt of deposition of E. E. Searles on behalf of petitioner to be taken the week of July 17, 1950. Stipulation of facts with exhibits 1 through 5, and appearance of Henry C. Perkins. Brief, Sept. 5, 1950. Replies October 5, 1950.

1950

- Aug. 2—Stipulation to take deposition of Eldon E. Searles filed.
- Aug. 10—Transcript of Hearing 7/5/50 filed.
- Aug. 31—Motion for extension to Oct. 5, 1950, to file original brief and Nov. 5, 1950, to file reply brief filed by taxpayer—granted 9/1/50.
- Sept. 19—Deposition of Eldon E. Searles filed. Copies served by notary.
- Oct. 4—Motion for extension to Oct. 20, 1950, to file original brief and Nov. 20, 1950, to file reply brief filed by taxpayer—granted 10/4/50.
- Oct. 5—Brief filed by General Counsel.
- Oct. 12—Brief filed by taxpayer. Copy served.
- Nov. 16—Reply brief filed by taxpayer. Copy served.

1951

- Feb. 16—Findings of Fact and Opinion rendered. Johnson J. Decision will be entered for respondent. Copy served.
- Feb. 19—Decision entered. Johnson J. Div. 10.
- May 9—Petition for Review by U. S. Court of Appeals for the Ninth Circuit and notice of filing same filed by taxpayer.
- May 9—Designation of contents of record on review filed by taxpayer.
- May 11—Proof of Service to Petition for Review and Designation of Record filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Seattle Division IT:90D:EEH), dated September 23, 1949, and as a basis of its proceeding alleges as follows:

1. The petitioner is and at all times mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business at Tacoma, Washington. The return for the period here involved was filed with the Collector for the District of Washington and Alaska.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A), was mailed to the petitioner September 23, 1949.

3. The taxes in controversy are:

(a) Income tax for the calendar year of 1944, amounting to an overassessment of Six Hundred Twelve and 29/100 (\$612.29) Dollars, the petitioner claiming the overassessment is approximately Three Hundred Seventy-five (\$375.00) Dollars.

(b) Excess profits tax for the calendar year of 1944, amounting to a deficiency of Twenty Thousand Five Hundred Thirty-seven and 77/100 (\$20,537.77) Dollars, the petitioner claiming an over-payment of approximately Ten Thousand (\$10,000.00) Dollars.

(c) Income tax for the calendar year of 1945,

amounting to an overassessment of Five Hundred Eighty-six and 13/100 (\$586.13) Dollars, the petitioner claiming an overassessment of approximately Eighty-five (\$85.00) Dollars.

(d) Excess profits tax for the calendar year of 1945, amounting to a deficiency of Twenty-two Thousand Two Hundred Twenty and 52/100 (\$22,220.52) Dollars, the petitioner claiming an overpayment of approximately Six Hundred Seventy (\$670.00) Dollars.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

- (a) Unallowable rentals, t a x a b l e
year ended December 31, 1944
(Item a, Page 2, Exhibit A) . . . \$36,684.92
- (b) Unallowable rentals, t a x a b l e
year ended December 31, 1945
(Item a, Page 4, Exhibit A) . . . 24,633.16

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is engaged in business as a marine terminal and warehouse, and during the late war handled a large amount of freight passing through the Port of Tacoma, Washington.

(b) Prior to September 30, 1943, petitioner rented lift trucks from the United States Army and other stevedoring companies at rates established by published tariffs applicable to all docks in the Port of Tacoma.

(c) As of September 30, 1943, petitioner began renting lift trucks from Equipment Associates, a

partnership organized by oral agreement on September 22, 1943, and evidenced by written agreement dated October 8, 1943. Petitioner continued to rent lift trucks from said partnership during the years 1944 and 1945 at rates established by the same published tariffs.

(d) During the years 1944 and 1945, the partners of Equipment Associates were as follows, each having a one-third interest:

S. B. Stocking

K. M. Kennell

W. Hopkins

and these three were also the sole shareholders of petitioner, the percentage interest being as follows:

S. B. Stocking.....78.5%

K. M. Kennell.....13 %

W. Hopkins..... 8.5%

(e) Equipment Associates was always managed as a separate business and complete books of account were always maintained. The only connection between petitioner and the partnership was as above stated and the relation of lessor and lessee of equipment.

(f) The capital invested in Equipment Associates came from the partners and borrowing on the personal credit of the partners and nothing invested in the partnership came from petitioner.

6. As hereinabove fully set forth, the Commissioner has therefore erred as follows:

(a) (4-(A)) In the disallowance of the deduction of rental paid by the petitioner to the Equip-

ment Associates of Thirty-six Thousand Six Hundred Eighty-four and 92/100 (\$36,684.92) Dollars in the taxable year ending December 31, 1944.

(b) (4-(B)) In the disallowance of the deduction of rental for trucks paid by the petitioner to the Equipment Associates of Twenty Four Thousand Six Hundred Thirty-three and 16/100 (\$24,633.16) Dollars in the taxable year ending December 31, 1945.

Wherefore, the petitioner prays that:

1. This Court may hear the proceeding and adjudge that there is no deficiency as contended for by the respondent, and that the deductions for rental paid to the Equipment Associates may be allowed.

SHAFFER TERMINALS, INC.

By /s/ S. B. STOCKING,
President, Petitioner.

/s/ SCOTT Z. HENDERSON,
Attorney for Petitioner.

/s/ GEO. J. BUSCH,
C. P. A.

State of Washington,
County of Pierce—ss.

S. B. Stocking, being first duly sworn, says that he is president of Shaffer Terminals, Inc., a corporation, the petitioner above named, and that he is authorized to verify said petition in behalf of said corporation; that he has read the foregoing petition and is familiar with the statements contained

therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ S. B. STOCKING.

Subscribed and sworn to before me this 8th day of December, 1949.

[Seal] /s/ CLARA J. CAMBY,
Notary Public in and for the State of Washington,
Residing at Tacoma.

EXHIBIT "A"

Treasury Department
Internal Revenue Service
Securities Building
Seattle, Washington

September 23, 1949

Office of
Internal Revenue Agent
in Charge, Seattle
Division
IT:90D:EEH

Shaffer Terminals, Inc.
PO Box 1157
Tacoma, Washington

Gentlemen:

You are advised that the determination of your income and excess profits tax liability for the taxable years ended December 31, 1944, and December 31, 1945, discloses a deficiency of \$42,758.29 in excess

profits tax and an overassessment of \$1,198.42 in income tax, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington, for the attention of IT:90D:EEH. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner.

By S. R. STOCKTON,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form 874

Forms 843 (2) in dup.

EEH:mtr

IT:90D:EEH

STATEMENT

Shaffer Terminals, Inc.

P.O. Box 1157

Tacoma, Washington

Tax Liability for the Taxable Years Ended December 31, 1944, and
December 31, 1945

Income Tax

Year	Liability	Assessed	Overassessment	Deficiency
1944	\$ 4,334.15	\$ 4,946.44	\$ 612.29	
1945	3,406.59	3,992.72	586.13	
Totals.....	\$ 7,740.74	\$ 8,939.16	\$1,198.42	

Excess Profits Tax

1944	\$40,777.32	\$20,239.55	\$20,537.77
1945	33,465.12	11,244.60	22,220.52
Totals.....	\$74,242.44	\$31,484.15	\$42,758.29

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated August 26, 1947; to your protests dated December 17, 1947; to the statements made at the conferences held on March 30, 1948; September 28, 1948, and February 15, 1949; and to your claim for refund filed on August 22, 1947.

In your income and excess profits tax returns for the years 1944 and 1945 and your income tax return for the year 1946, you have deducted rental paid to your officers and stockholders operating as a partnership under the name of Equipment Associates for lift trucks purchased by you and subsequently transferred to the partnership, in the respective amounts of \$41,134.82, \$29,434.46 and \$11,782.32. You have not established that the above rentals are proper deductions from income. There has therefore been added to your net income of the respective years, the excess of receipts over expenses of the claimed partnership exclusive of compensation paid to S. B. Stocking, your principal stockholder.

During the year 1945, you accrued and deducted on your returns for that year tentative back pay accrual of \$7,024.63 and tentative vacation pay accrual of \$1,081.65. Inasmuch as you were protesting the said increased expenses and no decision thereon was reached until the year 1946, the above accruals are held to be unallowable deductions of the year 1945. The properly determined amount of \$8,207.22, covering back pay and vacation pay, has been allowed as a deduction from your 1946 income.

If a petition to The Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by The Tax Court in any redetermination of your tax liability. If a petition

is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with Section 3772 of the Internal Revenue Code.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322 (a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on Form 843, copies of which are enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Geo. J. Busch, 1014 Puget Sound Bank Building, Tacoma 2, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1944
Adjustments to Net Income

Net income disclosed by return, Form 1120.....		\$42,362.49
Unallowable deductions and additional income:		
(a) Unallowable rentals	\$36,684.92	
(b) Capital stock tax	187.50	36,872.42
		<hr/>
Total		\$79,234.91
Nontaxable income and additional deductions:		
(c) Contributions	\$ 140.39	
(d) Net operating loss deduction	14,978.99	15,119.38
		<hr/>
Net income adjusted.....		\$64,115.53

Explanation of Adjustments

(a) As explained above, there is added to net income the excess of receipts over expenses of the claimed partnership operated under the name "Equipment Associates." Such excess has been determined to amount to \$36,684.92, and net income is increased by the amount shown.

(b) On the return a deduction of \$1,125.00 was claimed for capital stock tax. It is held that such deduction is allowable in the amount of \$937.50 and net income is increased by the difference of \$187.50 in the amounts shown.

(c) A deduction of \$2,229.61 for contributions was claimed on the return. Since contributions are allowable as a deduction in the amount of \$2,370.00, net income is reduced by the difference of \$140.39 in the amounts shown.

(d) Net income is reduced \$14,978.99, representing the amount of the allowable net operating loss deduction which was not claimed on the return. Such deduction is based on the net operating loss carry back from the taxable year 1946, which has been determined to amount to \$14,978.99.

Computation of Income Tax

Net income adjusted.....	\$64,115.53
Less: Income subject to excess profits tax.....	47,692.77
Normal tax and surtax net income.....	\$16,422.76
Normal tax: \$ 5,000.00 at 15%.....	\$ 750.00
11,422.76 at 17%.....	1,941.87
Total normal tax.....	2,691.87
Surtax: \$16,422.76 at 10%.....	1,642.28
Income tax liability.....	\$ 4,334.15
Income tax previously assessed Account No. 4100435.....	4,946.44
Overassessment of income tax.....	\$ 612.29

Adjustments to Excess Profits Net Income

Excess profits net income as disclosed by return, Form 1121....	\$43,240.03
Additions:	
(a) Unallowable rentals	\$36,684.92
(b) Capital stock tax	187.50
36,872.42	
Total	\$80,112.45
Deductions:	
(c) Contributions	\$ 140.39
(d) Net operating loss deduction.....	14,978.99
15,119.38	
Excess profits net income corrected.....	\$64,993.07

Explanation of Adjustments

(a), (b), (c) and (d)—The excess profits net income reported on the return is adjusted by the amount of the adjustments to the net income reported on the return, Form 1120, as explained above.

Computation of Excess Profits Tax

Excess profits net income corrected.....	\$64,993.07
Less: Specific exemption	\$10,000.00
Excess profits credit as determined.....	5,421.36
Unused excess profits credit	
as determined	1,878.94
17,300.30	
Adjusted excess profits net income.....	\$47,692.77
95% or \$47,692.77.....	45,308.13
Less: 10% credit.....	4,530.81
Excess profits tax liability.....	\$40,777.32
Previously assessed Account No. 4000140.....	\$22,488.39
Less: 10% credit, Sec. 784, I.R.C.	2,248.84
20,239.55	
Deficiency in excess profits tax.....	\$20,537.77

Shaffer Terminals, Inc., vs.

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income as disclosed by return, Form 1120.....		\$28,309.81
Unallowable deductions and additional income:		
(a) Unallowable rentals	\$24,633.16	
(b) Contingent reserve	8,106.28	
(c) Capital stock tax	937.50	33,676.94
		<hr/>
Total		\$61,986.75
Nontaxable income and additional deductions		
(d) Contributions	\$ 320.01	
(e) Net operating loss deduction.....	9,538.88	9,858.89
		<hr/>
Net income adjusted.....		\$52,127.86

Explanation of Adjustments

(a) As explained above, there is added to net income the excess of receipts over expenses of the claimed partnership operated under the name "Equipment Associates." Such excess has been determined to amount to \$24,633.16, and net income is increased by the amount shown.

(b) As explained above, it is held that tentative back pay accrual of \$7,024.63 and tentative vacation pay accrual of \$1,081.65 claimed as a deduction on the return in the total amount of \$8,106.28 is unallowable as a deduction for the taxable year, and net income is increased accordingly.

(c) It is held that capital stock tax claimed as a deduction on the return in the amount of \$937.50 is unallowable as a deduction for the taxable year, and net income is increased by the amount shown.

(d) It is held that a deduction for contributions is allowable in the amount of \$1,810.00. Since such deduction was claimed on the return in the amount of \$1,489.99, net income is reduced by the difference of \$320.01 in the amounts shown.

(e) Net income is reduced \$9,538.88, representing the amount of the allowable net operating loss deduction which was not claimed on the return. Such deduction is based on the net operating loss carry back from the taxable year 1947, which has been determined to amount to \$9,538.88.

Computation of Income Tax

Net income adjusted	\$52,127.86
Less: Income subject to excess profits tax.....	39,140.49
	<hr/>
Normal tax and surtax net income.....	\$12,987.37
Normal tax: \$5,000.00 at 15%.....	\$ 750.00
7,987.37 at 17%.....	1,357.85
	<hr/>
Total normal tax.....	\$ 2,107.85
Surtax: \$12,987.37 at 10%.....	1,298.74
	<hr/>
Income tax liability	\$ 3,406.59
Income tax previously assessed, Account No. 4101110.....	3,992.72
	<hr/>
Overassessment of income tax.....	\$ 586.13

Adjustments to Excess Profits Net Income

Excess profits net income as disclosed by return, Form 1121....	\$28,908.69	
Additions:		
(a) Unallowable rentals	\$24,633.16	
(b) Contingent reserve	8,106.28	
(c) Capital stock tax	937.50	33,676.94
		<hr/>
Total		\$62,585.63
Deductions:		
(d) Contributions	\$ 320.01	
(e) Net operating loss deduction.....	9,538.88	9,858.89
		<hr/>
Excess profits net income corrected.....		\$52,726.74

Explanation of Adjustments

(a), (b), (c), (d) and (e)—The excess profits net income reported on the return, Form 1121, is adjusted by the amount of the adjustments to the net income reported on the return, Form 1120, as explained above.

Computation of Excess Profits Tax

Excess profits net income corrected.....	\$52,726.74	
Less: Specific exemption	\$10,000.00	
Excess profits credit as determined.....	3,586.25	13,586.25
		<hr/>
Adjusted excess profits net income.....		\$39,140.49
95% of \$39,140.49.....		\$37,183.47
Less: 10% credit.....		3,718.35
		<hr/>
Excess profits tax liability.....		\$33,465.12
Previously assessed, Account No. 4000340.....		11,244.60
		<hr/>
Deficiency in excess profits tax.....		\$22,220.52

Received and Filed T.C.U.S. December 12, 1949.

Served December 14, 1949.

[Title of Tax Court and Cause.]

ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, alleges, and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3(A). Denies the allegations contained in subparagraph (A) of paragraph 3 of the petition. Alleges that the overassessment in income tax for 1944 is not in controversy before the Court in this proceeding.

(B). Admits that the tax in controversy for the calendar year 1944 is excess profits tax in the amount of \$20,537.77. Denies the remaining allegations contained in subparagraph (B) of paragraph 3 of the petition.

(C). Denies the allegations contained in subparagraph (C) of paragraph 3 of the petition. Alleges that the overassessment in income tax for 1945 is not in controversy before the Court in this proceeding.

(D). Admits that the tax in controversy for the calendar year 1945 is excess profits tax in the amount of \$22,220.52. Denies the remaining allegations con-

tained in subparagraph (D) of paragraph 3 of the petition.

4(A) & (B). Denies that the respondent committed error in determining the deficiencies as shown in the statutory notice, and specifically denies that the respondent erred as alleged in subparagraphs (A) and (B) of paragraph 4 of the petition.

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c). Admits that Equipment Associates was organized in 1943. Denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d). Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition.

(e). Admits that Equipment Associates maintained separate books of account. Denies the remaining allegations of subparagraph (e) of paragraph 5 of the petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

6(a) & (b). Denies the allegations contained in subparagraphs (a) and (b) of paragraph 6 of the petition.

7. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES OLIPHANT, DLB,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
Division Counsel.

DOUGLAS L. BARNES,
W. E. KOKEN,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed T.C.U.S. February 8, 1950.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys of record that the following facts are true and that the same may be so considered and accepted by the Court as offered in evidence by the parties to this proceeding: Provided, however, that the stipulation shall be without prejudice to the right of either of said parties to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The tax years in issue are the years ending December 31, 1944, and December 31, 1945.

2. Petitioner is a Washington corporation, having been organized under the laws of that state on April 16, 1921. At all times material to this proceeding, petitioner was engaged in the business of operating warehouse terminals and storage. Its office and principal place of business is at Tacoma, Washington. It keeps its books and files its returns on the accrual basis. Its returns for the taxable years ended December 31 of 1944, 1945 and 1946, were made to the Collector of Internal Revenue at Tacoma, Washington.

3. On January 1, 1943, the outstanding capital stock of petitioner was owned by the following persons as below indicated:

Shareholder	Shares
R. H. Shaffer.....	108
Samuel B. Stocking.....	72
K. M. Kennell.....	12
W. Hopkins.....	8
<hr/>	
Total	200

On October 20, 1943, R. H. Shaffer died. His shares of stock in petitioner were acquired by the surviving shareholders. On December 31, 1943, the capital stock of petitioner was held as follows:

Shareholder	Shares	Per Cent of Ownership
Samuel B. Stocking.....	157	78.5
K. M. Kennell.....	26	13
W. Hopkins.....	17	8.5
<hr/>		<hr/>
	200	100

4. During the period here involved and after the death of R. H. Shaffer, the sole officers of petitioner who were also its sole stockholders as indicated in paragraph 3 above, were as follows:

Samuel B. Stocking, President.

K. M. Kennell, Vice President-Secretary.

W. Hopkins, Treasurer.

5. On September 22, 1943, a partnership was organized by the individuals named in paragraph 3 under the style of Equipment Associates. Subsequent to the death of R. H. Shaffer on October 20, 1943, decedent's interest was acquired equally by the surviving partners and the business was continued as a partnership under the same name. The partners divided the profits of the partnership equally. Attached hereto and made a part hereof as Exhibit 1 is a true and correct copy of the agreement of said partnership dated October 8, 1943, evidencing an oral agreement entered into September 22, 1943.

6. The affairs of Equipment Associates were managed by Samuel B. Stocking, for which he was paid \$200.00 per month, and its books of account were kept by E. A. Seaton, for which he was paid \$30.00 per month, both items being deductions before partners' distribution of earnings. E. A. Seaton was also the regular bookkeeper for petitioner. Equipment Associates employed no other employees. It used the office of petitioner for which no rent or charge was paid. Petitioner and Equipment Associates kept separate books and records and there

was no intermingling of the partnership and corporate funds or records. Equipment Associates owned no other property except the equipment described in paragraph 7 below and acquired in the manner therein set forth.

7. During the war period petitioner's activity was primarily the handling of Government business for the Army and Navy. The availability for use of certain dock equipment, to wit: Clark-Fork Type Lift Trucks, was essential to the proper conduct of petitioner's business. This equipment was considered essential war material and could not be acquired except on priority. Petitioner could obtain these priorities on account of its essential war activities. Prior to September 22, 1943, petitioner had purchased and owned a considerable amount of this equipment. Subsequent to September 22, 1943, and at all times material to this proceeding, petitioner obtained the necessary priorities and purchased equipment similar to that already described, which it immediately transferred to the partnership Equipment Associates. Simultaneously with this transfer, Equipment Associates leased back to petitioner the use of said equipment at rentals set forth in paragraph 8 below. In addition to leasing said equipment from Equipment Associates, petitioner also leased the use of similar equipment from the United States Army and others. Attached hereto and made a part hereof as Exhibit 2 is a true and correct copy of a Sale and Lease Agreement dated October 8, 1943, executed by petitioner and Equipment Associ-

ates. Similar sale and lease agreements were executed by petitioner and Equipment Associates in March, 1944, and and in June, 1945. All of said sale and lease agreements were substantially similar in terms to those contained in Exhibit 2, differing only as to date and the amount of the sales value of the equipment.

8. The rentals paid by petitioner to Equipment Associates for the use of the equipment pursuant to the sale and lease agreements described in paragraph 7 above were as follows:

1943	\$ 6,892.50
1944	41,134.82
1945	29,434.46
1946	11,782.32
1947	900.00

Attached hereto and made a part hereof as Exhibit 3 is a true and correct list of all rentals paid by petitioner for equipment rented from Equipment Associates and from the United States Army and others for the period beginning January, 1942, and ending February, 1947. The rentals paid were the same in all cases for comparable periods and were all in accord with Tacoma Terminal Tariffs filed with the Public Service Commission of the State of Washington, in compliance with Sec. 10383 of Remington's Revised Statutes of Washington.

9. The petitioner secured authority from the War Production Board for the purchase of the needed equipment because it could secure such authority; the petitioner, in three cases, ordered the

equipment and sent a check with the order and before these checks were returned to Tacoma for payment, the partnership gave petitioner a check for the exact amount of the check petitioner had sent with the order, plus freight, except in one case. The pertinent dates and amounts are as follows:

Date Petitioner's Check	Amount	Date Paid	Date Equip. Assoc. Check
9/30/1943	\$ 9,529.44	10/13/1943	10/11/1943
3/21/1944	10,298.60	4/ 3/1944	3/27/1944
6/16/1945	10,319.61	6/27/1945	7/30/1945

10. The capital invested in Equipment Associates consisted solely of cash furnished in equal amounts by the partners. Each partner contributed \$2,500.00. The investment made by W. Hopkins was from his personal funds. Investments made by the other partners were in part from personal funds and in part from bank loans.

11. During the period here involved no dividends were declared by petitioner. Prior to this period the last dividend was in 1942, and the first dividend after this period was in January, 1946, in the amount of \$12,000.00. Corporate salaries authorized by petitioner under dates of September 1, 1941, and November 1, 1943, and paid to the officers designated below during the period here involved were as follows:

Officer	Sept. 1, 1941	Nov. 1, 1943
R. H. Shaffer	\$12,000	.....
Samuel B. Stocking	9,600	\$12,750
K. M. Kennell	4,800	9,850
W. Hopkins	4,500	6,000
Total.....	\$30,900	\$28,600

Attached hereto and made a part hereof, as Exhibit

4, is a true and correct summary of the partners' investments and withdrawals in Equipment Associates for the period involved in this proceeding.

12. The following then-existing facts were considered by the partners of Equipment Associates before the decision to organize the partnership was made:

(1) Petitioner needed an assured source of equipment.

(2) It was becoming difficult to secure equipment.

(3) The business of the petitioner at that time consisted almost entirely of handling shipments in connection with World War II which might cease at any time due to changes in war conditions or termination of the war; the particular shipments at that time being for the Alcan Highway to Alaska and lend-lease goods to Russia.

(4) Payments for rental equipment were substantial.

(5) Petitioner's profits were such that it already was in the 90% bracket under the excess profits tax and no substantial benefit would result from petitioner acquiring the necessary equipment.

13. The partnership Equipment Associates filed income tax returns for the years 1944 to 1946, inclusive, including the period from January 1, 1947, to June 30, 1947, when it was liquidated, in which it

reported gross profits, deductions and net profits as follows:

	1944	1945	1946	1/1-6/30/47
Gross Profit	\$41,468.32	\$30,568.07	\$11,725.32	\$ 912.72
*Deductions	7,183.40	8,277.91	5,135.23	1,035.79
	<u>\$34,284.92</u>	<u>\$22,290.16</u>	<u>\$ 6,590.09</u>	<u>(\$ 123.07)</u>
Distribution				
Stocking	\$11,428.31	\$7,430.05	\$2,196.69	
Kennell	11,428.31	7,430.05	2,196.70	
Hopkins	11,428.30	7,430.06	2,196.70	

* Includes salary for S. B. Stocking of \$2,400.00 per year for 1944, 1945 and \$1,050.00 for 1946.

14. Attached hereto and made a part hereof as Exhibit 5 is a true and correct summary of the working capital position of petitioner on certain designated dates, to wit: August 31, 1943, September 30, 1943; December 31, 1943; March 21, 1944; December 31, 1944, and June 16, 1945.

15. Attached hereto and made a part hereof as Exhibits A, B and C, respectively, are the original corporation income and declared value excess-profits tax returns of petitioner, including schedules and other documents attached to said returns, for the taxable years ending December 31 of 1944, 1945 and 1946.

16. Attached hereto and made a part hereof as Exhibits D, E, F and G, respectively, are correct copies of partnership income tax returns of Equipment Associates for the years 1944 to 1946, inclusive, and for the period ending June 30, 1947.

17. On April 23, 1946, Equipment Associates sold six pieces of equipment to petitioner for the sum of

\$10,613.49, plus State of Washington sales tax of \$318.40.

The remaining three pieces of equipment were distributed to the partners on June 30, 1947, and the partners sold said equipment to petitioner on October 27, 1947, for \$2,500.00 each in cash.

18. Subject to the approval and consent of the Court, either of the parties hereto may withdraw any or all of the exhibits attached hereto, or as may be otherwise received in evidence at this proceeding, for the purpose of preparing and substituting in their stead photostat copies thereof.

/s/ HENRY C. PERKINS,
Attorney for Petitioner.

/s/ CHARLES OLIPHANT, FHP,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

EXHIBIT 1

Partnership Agreement

This Agreement Witnesseth:

On September 22, 1943, Ralph H. Shaffer, Samuel B. Stocking, Kenneth M. Kennell and Winfred Hopkins, entered into a copartnership agreement, which agreement was then oral.

Now, Therefore, this written agreement evidences the articles of copartnership and agreement between the above-mentioned parties.

1. The partnership shall be known and shall op-

erate and transact business under the firm name and style of Equipment Associates, in the City of Tacoma, Pierce County, Washington.

2. The purpose and business of said copartnership shall be primarily to furnish certain equipment for the use of Shaffer Terminals, Inc., and used in essential war work. It is understood that the finances of Shaffer Terminals, Inc., are not sufficient to justify the purchase by said Shaffer Terminals, Inc., of said equipment, such as dock tractors, lift trucks, etc. Equipment Associates will purchase such equipment, hold the same for the exclusive use of Shaffer Terminals, Inc., during the duration of the present emergency, and lease said equipment to said Shaffer Terminals, Inc., at a reasonable rate of rental. When not being used by Shaffer Terminals, Inc., said equipment may, with the consent of Shaffer Terminals, Inc., be temporarily leased to others who have use for said equipment in essential war work.

3. Each partner will contribute an equal amount of money to the capital of the copartnership and will share equally in the profits of said business if there should be such profits. If salaries are to be paid to any of the partners, the amounts and terms of payment of such salaries will be determined by a majority vote of the partners and such salaries shall be in addition to the share of such partner or partners in the net profits.

4. Said partnership may, if decided by a vote of the partners, finance other institutions for like equipment to be used in essential war work. At the

time of the termination of the war or the emergency created thereby, the partnership will then determine the disposition to be made of the assets of the partnership.

5. It is not contemplated that it will be necessary for any partner to devote a considerable amount of his time to the affairs of the copartnership. Until otherwise determined by the copartnership, the affairs of the copartnership shall be under the supervision of Samuel B. Stocking, who is authorized to sign all documents and checks on banking accounts on behalf of the copartnership.

6. The copartnership is authorized and empowered to purchase from Shaffer Terminals, Inc., such equipment as Shaffer Terminals, Inc., may desire to dispose of at prices to be agreed upon between the copartnership and said Shaffer Terminals, Inc.

7. These articles of copartnership may be amended and the powers of the partnership enlarged by the mutual agreement of the parties hereto.

8. This partnership shall continue for a period of ten (10) years but may be terminated at any time by the action of any partner in giving notice to the other partners of the termination of this agreement. In the event that the partnership is terminated, as herein last provided, the remaining partners shall have the right, and are given the option, to purchase the interest of the retiring partner at the then book value of his interest as shown by the books of the partnership.

9. In the event of the death of any partner, the remaining partners are authorized to continue the business of said partnership until such time as the heirs or legal representatives of the deceased partner take such action as will cause a dissolution of the partnership.

10. Until otherwise determined by the action of the partners, the principal place of business of the partnership will be at the general offices, Dock No. 1, of Shaffer Terminals, Inc., in the city of Tacoma, Washington.

It Witness Whereof, the parties hereto have hereunto set their names this 8th day of October, 1943.

/s/ RALPH H. SHAFFER,
Tacoma, Wash.

/s/ SAM B. STOCKING,
Route #1, Box 442,
South Tacoma, Wash.

/s/ K. M. KENNEL,
3715 East L Street,
Tacoma, Wash.

/s/ WINFRED HOPKINS,
2005 East 34th Street,
Tacoma, Wash.

EXHIBIT 2

Sale and Lease Agreement

This Sale and Lease Agreement made and entered into as of September 30, 1943, by and between Shaffer Terminals, Inc., a corporation, and Equipment Associates, a copartnership, consisting of Ralph H. Shaffer, Samuel B. Stocking, Kenneth M. Kennell and Winfred Hopkins,

Witnesseth: Shaffer Terminals, Inc., has heretofore purchased certain machinery and equipment described in "Exhibit A," hereto attached and made a part hereof, as if fully set forth in this paragraph.

On September 30, 1943, Shaffer Terminals, Inc., sold and transferred said equipment to said Equipment Associates for the sum of \$9,529.44, under the following terms and conditions, to wit:

Shaffer Terminals, Inc., reserves the exclusive right to lease said equipment from Equipment Associates during the entire time of the emergency created by the existing war in which the Government of the United States of America is engaged and said Shaffer Terminals, Inc., agrees to pay to Equipment Associates a monthly rental of \$3.00 per hour of use, minimum 200 hours per month, for the use of said equipment and machinery until a different monthly rental is agreed upon by the parties hereto. Rate reduced to \$2.75 per hour with no minimum on March 1, 1944.

In the event Equipment Associates shall determine to dispose of any of said equipment, Shaffer Terminals, Inc., is given the first right to purchase

said equipment at a price to be agreed upon by the parties hereto and if a price cannot be agreed upon, each party will name one arbitrator; the two arbitrators thus selected will name a third arbitrator, and the determination of any two of said arbitrators shall be binding upon the parties hereto and the equipment will be sold at the price so fixed; provided, that Shaffer Terminals, Inc., shall not be obligated to purchase said equipment and machinery but may exercise its option so to do.

It is contemplated that further equipment and machinery will be required from time to time by Shaffer Terminals, Inc., and that said equipment will be provided by said copartnership and leased by said Shaffer Terminals, Inc. If and when said equipment and machinery is so purchased and so leased, an inventory of said equipment and machinery, together with the monthly rental to be paid therefor, shall be attached to this agreement and identified as a part thereof by the signatures of the parties hereto and thenceforth the terms of this agreement shall apply to said additional equipment and machinery.

It is understood that the equipment and machinery herein referred to is necessary for the operations of Shaffer Terminals, Inc., in doing essential war work; that the finances of said Shaffer Terminals, Inc., are not such at this time as to justify the purchase by said Shaffer Terminals, Inc., of said equipment and machinery and that the said partnership, Equipment Associates, has been organized for the purpose, among other things, of providing the necessary finances for Shaffer Terminals, Inc.

Shaffer Terminals, Inc., will at all times keep any and all of said leased property insured against fire, theft, property damage and public liability, such insurance to be payable to the parties as their interests may appear. Shaffer Terminals, Inc., will hold Equipment Associates harmless from any liability on account of any accidents which may happen to said equipment and machinery and all liability to any parties for the use thereof. Shaffer Terminals, Inc., will pay all operating costs and ordinary maintenance and repairs for said equipment and machinery and at the termination of the rental period will return said property to Equipment Associates in as good condition as when received, ordinary wear and tear excepted.

In Witness Whereof, Shaffer Terminals, Inc., has caused this contract to be executed by its officers thereunto duly authorized and Equipment Associates has caused this instrument to be executed for and on its behalf by Samuel B. Stocking, the duly authorized manager of said copartnership, this 8th day of October, 1943, the contract to be effective as of September 30, 1943.

SHAFFER TERMINALS, INC.

By /s/ RALPH H. SHAFFER,

/s/ K. M. KENNEL,

Secretary.

EQUIPMENT ASSOCIATES,

By /s/ S. B. STOCKING,

Managing Partner.

EXHIBIT 3

List of Rentals Paid by Shaffer Terminals, Inc., on
Account of Leased Equipment

1942	U. S. Army	Equipment Associates	All Others
January			
February			
March			\$ 519.00
April			
May			
June			
July			
August			
September			
October			576.00
November			816.00
December	\$ 1,726.50		1,466.00
	<hr/>		<hr/>
	\$ 1,726.50		\$ 3,377.00
1943			
January	\$ 2,236.50		\$ 534.75
February	1,800.00		243.00
March	2,781.00		150.00
April	1,800.00		
May	2,940.00		948.00
June	2,850.00		2,007.00
July	1,881.00		2,859.00
August	2,049.00		2,091.00
September	1,710.00		1,716.00
October	1,800.00	\$ 1,800.00	
November	1,800.00	2,347.50	
December	2,046.00	2,745.00	267.00
	<hr/>	<hr/>	<hr/>
	\$25,693.50	\$ 6,892.50	\$10,815.75
1944			
January	\$ 1,800.00	\$ 2,283.00	
February	1,800.00	1,800.00	
March	286.00	704.00	
April	302.50	1,476.75	
May	2,865.00	4,787.75	
June	2,066.50	3,833.50	
July	4,544.50	4,776.06	
August	4,766.25	5,558.44	
September	4,053.75	4,269.38	
October	4,903.50	4,516.19	
November	2,581.75	5,411.00	
December	2,633.50	1,718.75	
	<hr/>	<hr/>	
	\$32,603.25	\$41,134.82	

Shaffer Terminals, Inc., vs.

1945	U. S. Army	Equipment Associates	All Others
January	\$ 3,388.75	\$ 3,397.63	
February	1,692.00	3,454.00	
March	1,240.25	1,120.63	
April	1,290.25	1,607.38	
May	3,682.00	3,572.94	
June	1,918.75	2,619.38	
July	1,696.50	4,888.81	
August	272.25	2,749.31	
September	108.00	1,397.50	
October		397.38	
November		671.00	
December		3,558.50	

\$15,288.75

\$29,434.46

1946	
January	\$ 2,684.69
February	1,115.13
March	3,932.50
April	450.00
May	450.00
June	450.00
July	450.00
August	450.00
September	450.00
October	450.00
November	450.00
December	450.00

\$11,782.32

1947	
January	\$ 450.00
February	450.00

\$ 900.00

Equipment Rented to Other Than Shaffer Terminals

1944		
June	\$ 93.50	
July	48.00	
December	192.00	\$ 333.50
1945		
March	\$ 13.50	
April	232.50	
May	627.00	
July	49.50	
December	21.00	943.50
		<hr/>
		\$1,277.00

EXHIBIT 4

Equipment Associates
Summary of Partner's Investments and Withdrawals

	R. H. Shaffer	S. B. Stocking	K. M. Kennell	W. Hopkins
Cash invested 10/11/43.....	\$2,500.00	\$ 2,500.00	\$ 2,500.00	\$ 2,500.00
R. H. Shaffer's equity purchased by three partners.....	(2,500.00)	833.34	833.33	833.33
Profit Distributed:				
To October 20, 1943.....	246.95	\$ 246.95	\$ 246.95	\$ 246.96
To December 31, 1943.....	.....	1,486.86	1,486.86	1,486.86
1944.....	.....	11,428.31	11,428.31	11,428.30
1945.....	.....	7,430.05	7,430.05	7,430.06
1946.....	.....	2,196.69	2,196.70	2,196.70
1947.....	.....	(189.01)	(189.01)	(189.02)
Drawings:*	\$ 246.95	\$25,933.19	\$25,933.20	\$25,933.19
12/30 paid Muriel H. Shaffer, Administratrix.....	\$ 1.37	\$ 1.37	\$ 1.38	\$ 1.37
Cash.....	245.58	.....	.....	.....
1/10/44 cash.....	.....	1,000.00	1,000.00	1,000.00
† 4/44 cash.....	.....	900.00	900.00	900.00
† 14/44 cash.....	.....	600.00	600.00	600.00
7/15/44 cash.....	.....	1,500.00	1,500.00	1,500.00
		1,000.00	1,000.00	1,000.00

	R. H. Shaffer	S. B. Stocking	K. M. Kennell	W. Hopkins
8/31/44	1,000.00	1,000.00	1,000.00
9/15/44	1,500.00	1,500.00	1,500.00
10/31/44	750.00	750.00	750.00
12/29/44	2,500.00	2,500.00	2,500.00
1/15/45	800.00	800.00	800.00
3/10/45	1,600.00	1,600.00	1,600.00
8/23/45	1,000.00	1,000.00	1,000.00
6/ 9	1,500.00	1,500.00	1,000.00
†30/45	1,500.00
8/16/45	500.00	.....	.....
9/ 3/45	1,000.00	1,000.00	.....
10/11	500.00	1,500.00
1/15/46	1,000.00	1,000.00	1,000.00
4/25/46	3,537.83	3,537.83	3,537.83
9/30/46	765.00	765.00	765.00
1/15/47	750.00	750.00	750.00
7/30/47	400.00	400.00	400.00
Equipment	35.74	35.74	35.74
	\$ 246.95	2,293.25	2,293.25	2,293.25
		<u>\$25,933.19</u>	<u>\$25,933.20</u>	<u>\$25,933.19</u>

* The withdrawals do not include \$2,400.00 per year for 1944, 1945 and 1946 drawn by Samuel B. Stocking.

† Dates illegible.

EXHIBIT 5

Shaffer Terminals

Summary of Working Capital Position

Date	Bank Bal.	Accts. Rec.* Month End	Notes Pay. Month End	Accts. Pay. Month End	Social Security and Income Tax Reserves
8/31/43.....	\$ 115.72	\$120,946.06	\$15,000.00	\$27,399.19	\$23,670.46
9/30/43.....	28,683.33	134,756.42	35,000.00	37,538.50	13,293.22
12/31/43.....	19,297.28	104,345.78	32,000.00	12,317.73	.....
3/21/44.....	30,512.47	51,782.87	27,000.00	9,867.93	43,849.77
12/31/44.....	86,818.60	80,945.50	52,000.00	49,496.67	.....
6/16/45.....	63,129.76	108,473.80	7,000.00	33,168.15	20,178.05

* Army

Navy

Dept. of Agriculture

Soviet Purchasing Com.

British Purchasing Com.

Form 1180
 January 1944
 U.S. Department of the Treasury
 Internal Revenue Service

UNITED STATES CORPORATION INCOME AND DECLARED VALUE EXCESS-PROFITS TAX RETURN For Calendar Year 1944

for fiscal year beginning January 1, 1944, and ending December 31, 1944

TRUST PLAINLY CORPORATIONS NAME AND ADDRESS

SHAFER TERMINALS

P. O. Box 1167 Tacoma, Wash.

(City or town, post office number) (State)

Kind of business Warehousing & Storage

Employer's identification number (from Schedule M) 118

NORMAL-TAX NET INCOME COMPUTATION

GROSS INCOME

1. Gross income from operations		Less: Returns and allowances	
2. Gross income from other sources			
3. Total gross income			
4. Less: (a) Depreciation (From Schedule A)			
5. Less: (b) Amortization (From Schedule A)			
6. Less: (c) Depletion (From Schedule A)			
7. Less: (d) Charitable contributions (From Schedule A)			
8. Less: (e) Gifts (From Schedule A)			
9. Less: (f) Dividends received credit (From Schedule A)			
10. Less: (g) Interest on certain obligations (From Schedule A)			
11. Less: (h) Other deductions (From Schedule A)			
12. Total deductions			
13. Normal-tax net income			

DEDUCTIONS

14. Compensation of officers (From Schedule F)			
15. Salaries and wages (Not deducted elsewhere)			
16. Rent			
17. Repairs			
18. Fuel (From Schedule G)			
19. Utilities			
20. Taxes (From Schedule H) (Deduct declared value excess-profits tax as item 35)			
21. Advertising or gifts paid (From Schedule I)			
22. Losses from storms, shipwreck, or other casualty, or theft (Submit schedule)			
23. Depreciation (From Schedule J)			
24. Depletion (Of minerals, oil and gas wells, timber, etc. (Submit schedule)			
25. Amortization of intangible assets (Submit statement)			
26. Amortization of emergency facilities (Submit schedule)			
27. Other deductions authorized by law (From Schedule K)			
28. Total deductions (Items 14 to 27 inclusive)			
29. Normal-tax net income (From Schedule L)			
30. Less: (a) Interest on certain obligations of the United States and its instrumentalities issued prior to March 1, 1941 (Enter amount of item 9 (a) and 32)			
31. Adjusted net income			
32. Less: (b) Dividends received credit 85 percent of column 2, Schedule E, but not in excess of 40 percent of item 31 minus item 30, above			
33. Normal-tax net income			

TOTAL INCOME AND DECLARED VALUE EXCESS-PROFITS TAXES

34. Total income tax (line 28 or 30, page 2, whichever is applicable)			
35. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation			
36. Balance of income tax			
37. Total declared value excess-profits tax (line 3, page 2)			
38. Total income and declared value excess-profits taxes due			

AFFIDAVIT. (See Instruction D)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself, do hereby declare and say that this return (including all schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete statement of the facts for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 15th day of May, 1944

NOTARIAL SEAL

Evelyn L. McKee
 Notary Public in and for the State of Washington
 Tacoma, Wash.

AFFIDAVIT. (See Instruction D)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return, including all schedules and statements, is a true, correct, and complete statement of all the information required by the law for the taxable year stated, and of which I/we have any knowledge.

Subscribed and sworn to before me this 15th day of May, 1944

NOTARIAL SEAL

Evelyn L. McKee
 Notary Public in and for the State of Washington
 Tacoma, Wash.

339
 4100435
 1236 61
 44

Totals

Total of columns 2, 3, and 4. (Enter as item 13, page 1)

*Except dividends received from corporations reported under line 1 (Form 706-101, 1968, and dividends received in the hands of estate (80) of the Internal Revenue Code, which dividends should be reported on column 2.

†Dividends on stock accounts by Federal savings and loan associations in lieu of share dividends earned prior to March 30, 1954, should not be listed, but the amount should be included in item 13.

Schedule F—COMPENSATION OF OFFICERS

1. Name and address of officer

2. Official Title

3. Title Received in Service

4. Percentage of Corporation's Stock Owned

5. Amount of Compensation

Mr. My. Thompson

President

Mr. My. Thompson

100%

\$ 272.10

Mr. Hopkin

President

Mr. Hopkin

100%

\$ 24.18

Total compensation of officers. (Enter as item 14, page 1)

Note: Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of \$75,000 was paid to any officer or director.

Schedule G—BAD DEBTS (See Instruction 20) (See items 1 and 2)

1. Taxable Year

2. Was income reported?

3. State or States

4. Bad debts in excess of \$100,000

5. Amount of loss

6. Amount of loss

1940

1941

1942

1943

1944

1. Check whether deduction claimed on previous return with respect to bad debts was in excess of \$100,000. If so, enter as item 23, page 1.

2. Check whether deduction claimed on previous return with respect to bad debts was in excess of \$100,000. If so, enter as item 23, page 1.

Schedule H—TAXES (See Instruction 22)

1. Federal

2. State

Old Age

Unemployment

Excise

Capital Stock

Gross Earnings

Real Estate

Total

(Enter as item 24, page 1)

\$ 11,750.00

Schedule I—CONTRIBUTIONS OR GIFTS PAID (See Instruction 23)

1. Name and address of contributor

2. Amount

Schedule

Total (Enter as item 25, page 1, subject to 5 percent limitation.) (See Instruction 23)

Schedule J—DEPRECIATION (See Instruction 24)

1. Kind of Property (If Schedule, state nature of which contributed)

2. Date Acquired

3. Cost or other basis (Do not include land or other non-depreciable property)

4. Assets Fully Depreciated by 12/31 of Year

5. Depreciation Allowed for Year

6. Remaining Basis (If None, Enter 0)

7. Total Depreciation Allowed for Year

8. Depreciation Allowed for Year

Mach. & Equip.

Office

Autos

1928/41

"

1940/41

\$49,785.10

\$ 604.65

\$ 930.08

\$

\$ 21,048.88

\$ 3,014.13

\$ 1,009.40

19 681.84

1 390.82

1 920.89

15

4

\$ 5,479.68

109.62

610.90

Total (Enter as item 26, page 1)

\$7,885.84

\$5,069.79

\$2,183.05

\$ 6,196.57

Schedule K—OTHER DEDUCTIONS (See Instruction 29)

Repairs - Machinery: 1,548.94

QUESTIONS

1. Date of Incorporation: April 16, 1981
2. State or country: Wash.
3. State collector's office where the corporation's return for the preceding year was filed: Wash.
4. The corporation's books are in care of: Corp. Officers, Tacoma, Wash.
5. Number of places of business: 120
6. Did the corporation during the taxable year have any Government contracts or subcontracts? (Answer "yes" or "no") No. If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts. (See Instruction G-20.)
7. Is the corporation a personal holding company within the meaning of section 561 of the Internal Revenue Code? No. (If so, so add: Should return on Form 1000 be filed.)
8. Is this a consolidated return? No. (If so, provide from the estimator of Internal Revenue for your district Form 211, Affidavit Schedule, which shall be filed in, with it, and filed as a part of this return.)
9. If this is not a consolidated return: (a) did the corporation own at any time during the taxable year 50 percent or more of the voting stock of another corporation or other domestic or foreign? No. (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of the corporation's

- voting stock? (If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)
10. Is this return made on the basis of each receipt and disbursement? If not, describe fully in separate statement.
11. Did the corporation at any time during the taxable year have in its employ more than eight individuals? (Answer "yes" or "no"). If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "yes" or "no"). If answer to second question is "yes," attach statement as required by Instructions 16 and 17.
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis is used, explain fully in separate statement, giving date inventory was last reconciled with stock.
13. Did the corporation make a return of information on Forms 1066 and 1069 or Form W-2 (or Form W-3a) for the taxable year 1944 (see Instruction O-11)?
14. Has any transaction described in Instruction G-18 occurred on or after January 1, 1941? (Answer "yes" or "no").
15. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no"). (If answer is "yes," attach statement as required by Instruction K-20.)



LINE	DESCRIPTION	1960		1961		1962	
		AMOUNT	PERCENT	AMOUNT	PERCENT	AMOUNT	PERCENT
1.	Cash			\$ 15,000.00		\$ 15,000.00	
2.	Notes and accounts receivable						
	Less: Reserve for bad debts			104,345.78		80,945.60	
3.	Investments (Specify in separate schedule)						
4.	Intergovernmental obligations:						
	(a) Obligations of the United States Government, or the District of Columbia, or District of Columbia						
	(b) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(c) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(d) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(e) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(f) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(g) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(h) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(i) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(j) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(k) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(l) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(m) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(n) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(o) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(p) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(q) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(r) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(s) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(t) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(u) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(v) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(w) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(x) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(y) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
	(z) Obligations issued by or to the Government of the District of Columbia, or the District of Columbia						
5.	Capital assets						
	(a) Depreciable assets (Specify in separate schedule)	\$ 33,154.18		\$ 37,888.84			
	Less: Reserve for depreciation	30,069.78		34,064.39		15,992.36	
	(b) Depreciable assets						
	Less: Reserve for depreciation						
	(c) Land						
6.	Other assets (Specify)						
	Long Term U.S. Gov. Bonds			7,500.00			
	Prepaid Ins.			122.95			
	Other Assets						
	LIABILITIES			\$ 131,841.40		\$ 194,317.45	
7.	Accounts payable						
	Accounts payable			\$ 15,317.73		\$ 49,888.88	
8.	Notes, notes, and mortgages payable						
	(a) With original maturity of less than 1 year	\$ 38,000.00		\$ 38,000.00			
	(b) With original maturity of 1 year or more					38,000.00	
9.	Unpaid expenses (Specify)						
	Unpaid expenses			2,000.00			
	Unpaid expenses			2,000.00		2,000.00	
	Unpaid expenses			2,000.00		2,000.00	
10.	Other liabilities (Specify)						
	Other liabilities						
11.	Reserve for depreciation (Specify in separate schedule)						
12.	Capital stock						
	(a) Preferred stock						
	(b) Common stock						
13.	Paid-up capital (Specify)						
14.	Unpaid surplus (Specify in separate schedule)						
15.	Other liabilities (Specify)						
	Other liabilities						
	Other liabilities						

Schedule M—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

EXCESS PROFITS TAX. (See Instructions for Form 112)

- 11 If corporation makes association under section 727 of the Internal Revenue Code, state basis of claim:
- 12 If any gross profit tax return is being filed for the reason that the gross profits tax imposed imposed under the Internal Revenue Code is not greater than \$10,000, the following Schedule N should be filed: The completion of Schedule N does not constitute the filing of a return under the Internal Revenue Code.

Schedule N—EXCESS PROFITS NET INCOME COMPUTATION

1. Normalized net income (computed without credit for income subject to income profile tax and dividends received credit) (line 8, page 1)		6. Dividends received credit adjustment (line 5, page 1, excluding the part of the dividends received credit on which the 10% tax applies) (line 10, page 1)	
2. Dividend income (line 10, page 1)		7. Net gain from sale or exchange of capital assets (line 13 (a), page item 5A, page 1)	
3. Dividend income (line 10, page 1)		8. Income from retirement or discharge of bonds, etc.	
4. Dividend income (line 10, page 1)		9. Refunds and interest on Agricultural Adjusted Asset Value	
5. Dividend income (line 10, page 1)		10. Dividends of last date	
6. Total of lines 1 to 5		11. Total of lines 6 to 10	
7. Dividend income (line 10, page 1)			
8. Dividend income (line 10, page 1)			
9. Dividend income (line 10, page 1)			
10. Dividend income (line 10, page 1)			
11. Dividend income (line 10, page 1)			
12. Dividend income (line 10, page 1)			
13. Dividend income (line 10, page 1)			
14. Dividend income (line 10, page 1)			
15. Dividend income (line 10, page 1)			
16. Dividend income (line 10, page 1)			
17. Dividend income (line 10, page 1)			
18. Dividend income (line 10, page 1)			
19. Dividend income (line 10, page 1)			
20. Dividend income (line 10, page 1)			
21. Dividend income (line 10, page 1)			
22. Dividend income (line 10, page 1)			
23. Dividend income (line 10, page 1)			
24. Dividend income (line 10, page 1)			
25. Dividend income (line 10, page 1)			
26. Dividend income (line 10, page 1)			
27. Dividend income (line 10, page 1)			
28. Dividend income (line 10, page 1)			
29. Dividend income (line 10, page 1)			
30. Dividend income (line 10, page 1)			
31. Dividend income (line 10, page 1)			
32. Dividend income (line 10, page 1)			
33. Dividend income (line 10, page 1)			
34. Dividend income (line 10, page 1)			
35. Dividend income (line 10, page 1)			
36. Dividend income (line 10, page 1)			
37. Dividend income (line 10, page 1)			
38. Dividend income (line 10, page 1)			
39. Dividend income (line 10, page 1)			
40. Dividend income (line 10, page 1)			
41. Dividend income (line 10, page 1)			
42. Dividend income (line 10, page 1)			
43. Dividend income (line 10, page 1)			
44. Dividend income (line 10, page 1)			
45. Dividend income (line 10, page 1)			
46. Dividend income (line 10, page 1)			
47. Dividend income (line 10, page 1)			
48. Dividend income (line 10, page 1)			
49. Dividend income (line 10, page 1)			
50. Dividend income (line 10, page 1)			
51. Dividend income (line 10, page 1)			
52. Dividend income (line 10, page 1)			
53. Dividend income (line 10, page 1)			
54. Dividend income (line 10, page 1)			
55. Dividend income (line 10, page 1)			
56. Dividend income (line 10, page 1)			
57. Dividend income (line 10, page 1)			
58. Dividend income (line 10, page 1)			
59. Dividend income (line 10, page 1)			
60. Dividend income (line 10, page 1)			
61. Dividend income (line 10, page 1)			
62. Dividend income (line 10, page 1)			
63. Dividend income (line 10, page 1)			
64. Dividend income (line 10, page 1)			
65. Dividend income (line 10, page 1)			
66. Dividend income (line 10, page 1)			
67. Dividend income (line 10, page 1)			
68. Dividend income (line 10, page 1)			
69. Dividend income (line 10, page 1)			
70. Dividend income (line 10, page 1)			
71. Dividend income (line 10, page 1)			
72. Dividend income (line 10, page 1)			
73. Dividend income (line 10, page 1)			
74. Dividend income (line 10, page 1)			
75. Dividend income (line 10, page 1)			
76. Dividend income (line 10, page 1)			
77. Dividend income (line 10, page 1)			
78. Dividend income (line 10, page 1)			
79. Dividend income (line 10, page 1)			
80. Dividend income (line 10, page 1)			
81. Dividend income (line 10, page 1)			
82. Dividend income (line 10, page 1)			
83. Dividend income (line 10, page 1)			
84. Dividend income (line 10, page 1)			
85. Dividend income (line 10, page 1)			
86. Dividend income (line 10, page 1)			
87. Dividend income (line 10, page 1)			
88. Dividend income (line 10, page 1)			
89. Dividend income (line 10, page 1)			
90. Dividend income (line 10, page 1)			
91. Dividend income (line 10, page 1)			
92. Dividend income (line 10, page 1)			
93. Dividend income (line 10, page 1)			
94. Dividend income (line 10, page 1)			
95. Dividend income (line 10, page 1)			
96. Dividend income (line 10, page 1)			
97. Dividend income (line 10, page 1)			
98. Dividend income (line 10, page 1)			
99. Dividend income (line 10, page 1)			
100. Dividend income (line 10, page 1)			



Contributions—Schedule J

Shaffer Terminals	1944 Return
American Red Cross, Tacoma, Wash.	\$ 400.00
National Prob. Ass'n	10.00
Tacoma Police Relief	10.00
YMCA	125.00
Com. Chest	800.00
Tuberculosis League	25.00
Pacific Lutheran College	500.00
College of Puget Sound	500.00
	<hr/>
	\$2,370.00
5% of \$44,592.10	\$2,229.61
	<hr/>
Unallowable	\$ 140.39

Other Deductions—Line 29

Auto Expense	\$ 1,660.29
Advertising	1,257.52
Crane Expense	4,632.06
Dues	435.07
General Expense	9,325.09
Insurance	1,709.98
Light Water and Power.....	1,807.57
Office Expense	2,220.25
Tractor Expense	9,804.18
Telephone and Telegraph	2,237.10
	<hr/>
	\$35,089.11
Less Unallowable Dues.....	562.00
	<hr/>
	\$34,527.11

Labor—Schedule B

Dock	\$ 37,605.00
Payroll	180,853.87
Miscellaneous	7,493.00
	<hr/>
	\$225,951.87
Less Credit	60,500.59
	<hr/>
	\$165,451.28

Gross Receipts—Line 4

Loading and Unloading	\$139,162.71
Handling	137,158.72
Miscellaneous	12,165.59
Storage	51,542.45
Wharfage	156,434.69
	<hr/>
	\$496,464.16

Fixed Assets		Year 1944
Shaffer Terminals	1/1/44	12/31/44
Machinery and Equipment	\$45,680.95	\$49,728.10
Furniture and Fixtures	4,523.14	4,604.65
Autos	2,930.09	2,930.09
	<hr/>	<hr/>
	\$53,134.18	\$57,262.84
Rent		
Equipment		\$ 72,810.91
Equipment in General Expense		4,083.00
Plant Facilities		107,641.02
		<hr/>
		\$184,534.93

Income Tax Unit

IT:C1:CC-2

Treasury Department

Office of

Commissioner of Internal Revenue

Washington 25

Notice of Adjustment
of Excess Profits Tax Ten Per Cent Credit

Serial No. of Return: 4000140-45

Allowed: \$2,248.84

Schedule No. 552

Shaffer Terminals,

P. O. Box 1157,

Tacoma, Wash.

Gentlemen:

An examination of the excess profits tax return filed for the year 1944, indicates that credit was not taken thereon for the ten per cent credit provided by Section 784(a) of the Internal Revenue Code, as added by the Tax Adjustment Act of 1945. Such credit has been allowed in the amount stated above, and has been abated, credited, or refunded in accordance with the present status of your tax account for the year involved, as stated below.

A check for any amount refundable is transmitted herewith. No interest is payable on this allowance.

By direction of the Deputy Commissioner:

Very truly yours,

/s/ T. C. ATKINSON,
Head of Division.

Abated: \$2,248.84

Credited: \$

Refunded: \$

Internal Revenue Agent in Charge:

Bureau records indicate that the return in this case was referred to you. In accordance with Com-Mim. Coll. No. 5910 R. A. No. 1452 you will have the amount of this allowance stamped on the return and this copy attached thereto.

Form 7986-D

Aug., 1945

(Duplicate)

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

In pursuance of the provisions of existing Internal Revenue Laws, Shaffer Terminals, Inc., a taxpayer (or taxpayers) of Tacoma, Washington, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1944, under existing acts, or under prior revenue acts, may be assessed at any time on or

before June 30, 1950, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

[Seal] SHAFER TERMINALS, INC.,
Taxpayer.

By /s/ K. M. KENNEL,
Vice President.

/s/ GEO. J. SCHOENEMAN,
Commissioner of Internal
Revenue.

By C.R.M.

February 11, 1949.

[Stamped]: Received Feb. 11, 1949, Northwestern Division Seattle office.

(Duplicate)

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

....., 19....

In pursuance of the provisions of existing Internal Revenue Laws, Shaffer Terminals, Inc., a taxpayer (or taxpayers) of Tacoma, Washington, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1944, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1949, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

[Seal] SHAFFER TERMINALS, INC.,
Taxpayer.

By /s/ SAM B. STOCKING,
President.

/s/ GEO. J. SCHOENEMAN,
Commissioner of Internal
Revenue.

By /s/ L. C. H.

Nov. 18, 1947.

[Stamped]: Received Nov. 18, 1947, Seattle Division.

NOT INVESTIGATED 1944

PRINT PLAINLY ORIGINATOR'S NAME AND ADDRESS

SHAPING BEHAVIOR

P.O. Box 1157

Tacoma Wash.

Business group serial number entered on page 1, Form 1120 118

EXCESS PROFITS TAX COMPUTATION

File
Cash 339
Serial
No. 4000140
District Wash
(Cashier's stamp)
5627
Cash Clerk M. O.
First payment
144

MAR 15 1945
 TACOMA OFFICE

	Column 1 Income Credit Method	Column 2 Excess Profit Credit Method
Excess profits net income (line 18, Schedule A)	\$	\$ 43,240.03
Specific exemption	\$ 10,000	10,000
Excess profits credit based on income (line 46, Schedule B)		9,568.04
Excess profits credit based on invested capital (line 40, Schedule C)		19,568.04
Dividend credit (attach schedule)		23,671.99
Difference between 1 and 6		22,488.39
Adjusted excess profits net income (Item 7, column 1, or Item 7, column 2, whichever is applicable)		22,488.39
95 percent of Item 8		21,363.92
Net income (Item 36, page 1, Form 1120)		21,363.92
Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120 (excluding dividends received on certain preferred stock of a public utility), but not in excess of 85 percent of Item 10 above)	\$	
(b) Credit for dividends paid on certain preferred stocks if taxpayer is a public utility (20 percent of line 20, page 2, Form 1120)	\$	
Excess net income (computed without regard to the credit provided in section 26 (e) (sum of lines 18 and 21, page 2, Form 1120) and without regard to 80 percent of the credit provided in section 26 (b))	\$	\$ 43,362.49
80 percent of Item 12		33,869.99
Income tax under Chapter 1 (other than section 102) for the taxable year (Item 43, page 1, Form 1120)		946.84
Excess of Item 13 over Item 14		28,943.55
Item 9, or Item 15, whichever is lesser		22,488.39
Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormality under section 722) (attach schedule)		
Excess profits tax:		
(a) Item 16 minus Item 17	\$ 22,488.39	
(b) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule		22,488.39
(c) Item 18 (a) or Item 18 (b), whichever is applicable		22,488.39
Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (question not used in computing Item 43, page 1, Form 1120)		
Item 19 (a) minus Item 19		22,488.39
Less: Credit for debt retirement (Item 20, below)		
Item 20 minus Item 21		22,488.39
Amount, if any, due in application of section 734 (adjustment in case of question inconsistent with prior income tax liability) (question not used)		22,488.39
Excess profits tax due (Item 22 plus Item 23, or Item 22 minus Item 23, whichever is applicable)		22,488.39
POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT		
Balance of excess profits tax (Item 13 (c), above)		22,488.39
Credit allowable under sections 780 and 781 (10 percent of Item 25) (not in cases where Item 19 is applicable, see Specific Instructions 25-29)		2,248.84
Less: of amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (7)	\$	
Credit for debt retirement allowable under section 783 (60 percent of Item 27, but not in excess of 10 percent of Item 25)		2,248.84
Net amount refund or to be shown (Item 26 minus Item 28)		2,248.84

[illegible]

Notary Public in and for the
State of Wash. Residing at
Tacoma.

Page 2

Questions

- (a) Date of incorporation April 16, 1921.
- (b) State or country Wash.
- (c) Collector's office in which your income tax return for the taxable year was filed Tacoma, Wash.
- (d) Is this a consolidated return? No. If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.
- (e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") Yes.
- (f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No.
- (g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") No.
[Sections (1), (2), and (3)—blank.]
- (h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), \$194,317.45.
- (i) Has a constructive average base period net income under section 722 been used in computing the excess profits credit used on this return? No.
[Sections (1), (2), and (3)—blank.]
- (j) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income?.....
If the answer is "yes," attach schedule showing computation.

Schedule A.—Excess Profits Net Income Computation

Line No.	Column 1	Column 2
	Income Credit Method	Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120).....	
		\$42,362.49
5.	50 per cent of interest on borrowed capital.....	
		877.54
7.	Total of lines 1 to 6.....	
		\$43,240.03
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15).....	
		\$43,240.03

18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)\$43,240.03

[Lines 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, and 17—blank.]

Schedule B.—Excess Profits Credit—Based on Income Page 3
[No data supplied in this schedule.]

Page 4 Schedule C.—Excess Profits Credit—Based on
Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital.....\$20,000.00

[Lines 2 and 3—blank.]

4. (a) Accumulated earnings and profits\$83,219.31

[Sections (b) and (c)—blank.]

- (d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)..... 83,219.31

[Lines 5, 6, and 7—blank.]

8. Total of lines 1 to 7.....\$103,219.31

[Lines 8 through 13—blank.]

14. Equity invested capital at beginning of taxable year (line 8 minus line 13).....\$103,219.31

Average Addition to Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

[Lines 15 through 21—blank.]

22. Total of lines 14 and 21.....\$103,219.31

Average Reduction in Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

[Lines 23 through 27—blank.]

(See Instructions for Schedule C, lines 28 to 40, inclusive)

28. Average equity invested capital (line 22 minus line 27).....\$103,219.31

29. Average borrowed capital (attach schedule)\$ 36,125.68

30. Average borrowed invested capital (50 per cent of line 29)..... 18,062.84

31.	Average invested capital (line 28 plus line 30).....	\$121,282.15
32.	Total inadmissible assets.....	\$ 2,400.00
33.	Total admissible and inadmissible assets	\$173,079.43
34.	Percentage which line 32 is of line 33.....	1.3866%
35.	Reduction on account of inadmissible assets (..... per cent of line 31).....	1,681.70
36.	Invested capital (line 31 minus line 35).....	\$119,600.45
37.	Portion of line 36 (not over \$5,000,000); and credit at 8 per cent.....	\$ 9,568.04
[Lines 38 and 39—blank.]		
40.	Excess profits credit—based on invested capital (total of lines 37 to 39).....	\$ 9,568.04

Borrowed Capital

Shaffer Terminals		Borrowed Capital		1944 Return	
	Additions	Reductions	Balance	Days	Product
			\$32,000.00	81	\$2,592,000.00
3/21/44		\$5,000.00	27,000.00	134	3,618,000.00
8/ 2/44	\$10,000.00		37,000.00	56	2,072,000.00
9/29/44	15,000.00		52,000.00	95	4,940,000.00
					\$13,222,000.00
Average.....					\$36,125.68

Assets

1/ 1/44.....	\$151,841.40
12/31/44.....	194,317.45
	<hr/>
	\$346,158.85
Average.....	\$173,079.43

Inadmissibles

Average	\$2,400.00
Per Cent	1.3866

INCOME TAX COMPUTATION. (See Computation Instructions)

NORMAL TAX CONSIDERATION

DOMESTIC CORPORATION WITH NORMAL-TAX NET INCOME NOT OVER \$100,000

RECEIVED: 1987-01-14

CONTINUATION WITH SHEET NO. INCORPORATED BY REFERENCE

TAX COMPUTATION FOR REGULATED INVESTMENT COMPANY

no. 1, but computed without regard to whether AT (0%)

Schedule A.—COST OF GOODS SOLD. (See instruction E)

(Where brackets are not an income-determining factor)

Schedule B.—COST OF OPERATIONS

(Where brackets are not an income-determining factor)

(When brackets are in boxes, determine later)

Blank 15. Form 100 should be entered and used in reporting sale and exchange of capital assets and filed with and as a part of this return.

(Where inventories are not an income-determining factor)

Form 1041 (2008) (Page 118) should be entered and used in reporting sales and exchanges of capital assets and filed with and as a part of this return.

THE GAIN AND LOSS FROM SALES OR EXCHANGES OF PROPERTY CONTINUED

Total no. pages (of issue): (Enter no. issue 15 (2) page 11)

THE UNIVERSITY OF CHICAGO

...the ... of ...

A. Domestic Operations		B. Foreign Operations		C. Other Operations	
1. Sales		1. Sales		1. Sales	
2. Cost of Sales		2. Cost of Sales		2. Cost of Sales	
3. Operating Expenses		3. Operating Expenses		3. Operating Expenses	
4. Depreciation and Amortization		4. Depreciation and Amortization		4. Depreciation and Amortization	
5. Other Income		5. Other Income		5. Other Income	
6. Other Expenses		6. Other Expenses		6. Other Expenses	
7. Income Before Taxes		7. Income Before Taxes		7. Income Before Taxes	
8. Income Tax Expense		8. Income Tax Expense		8. Income Tax Expense	
9. Net Income		9. Net Income		9. Net Income	

2. and 4. (Enter as Week 12, page 1)

Article 7. COMPENSATION OF OFFICERS

1. Name and Address of Seller	2. General Title	3. Type of Goods to be Sold	Percentage of Corporation's Stock Owned		4. Amount of Cash Received
			4. Common	5. Preferred	
A. B. Stocking K. M. Randall	Tacoma, Wa. "	Pres. V. Pres. & Sec.	As Reqd. Entire		\$ 26,780 9,439 12

Total complementing of officers. (Enter as item 16, page 1)

Note.—Schedule D-1 (IN DUPLICATES) also must be filed with this return if compensation in excess of \$75,000 was paid to any officer or director.

Schedule C.—BAD DEBTS. (See instruction III) (See notes 1 and 2)

A. Fiscal Year	B. Was License Required		C. Status of License		D. Total Amount of Charges Paid, or Not Received, in Connection with License (See Note 1)		E. Comparison of Charges to Receipts	
							F. Charges Accepted or Refused by Licensee(s)	G. Amount of Charges Accepted or Refused
1941								
1942								
1943								
1944								

1. Check whether donation, claimed represents debts which have become worthless ☐ or is an addition in a reserve ☐
2. Not including donation which are capital assets and which become worthless within the taxable year. But donation which become worthless within the year should be reported in Schedule C.

Schedule H.—TAXES. (See instruction 23)

Volume	Amount	Name and Address of Organization	Amount
Series	\$ 880 02	Schedule	\$ 1 500 00
County A.R.	390 43	City of St. Louis MO	1 400 00
Capital Stock	937 50		
Gross Receipts	213 15		
O.A.R.	1 726 08		
Unemployment	2 224 43		
Total (Enter as item 32, page 1)	\$ 5 183 48	Total (Enter as item 32, page 1, subject to 2 percent limitation) (See instructions 32)	\$ 3 270 00

Schedule 1—CONTRIBUTIONS OR GIFTS PAID. (See instructions.)

Schedule M.—TAXES. (See instructions 25)		Name and Address of Organization		Amount	
Wages	Amount	Schedule			
Salaries	480 08				
Commut. & A.	390 43				
Capital Stock	907 50				
Gross Earnings	115 15				
D.A.B.	1 780 88				
Unemployment	2 328 43				
Total. (Enter as item 22, page 1, subject to 2 percent limitation.) (See instructions 25)	4 188 45				

Schedule J—DEPRECIATION. (See instruction 8B)

1. Kind of Property (If business, state character of related activity)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)	4. Month Fully Depreciated in Use at End of Year	5. Depreciation Allowed for Prior Years	6. Depreciation Allowed for Current Year	7. Remaining Cost or Other Basis at End of Year	8. Total Depreciation Allowed for Prior Years	9. Total Depreciation Allowed for Current Year	10. Total Depreciation Allowed for All Years
Mach. & Equip.	1964-41	\$50,000.00	55	\$25,000.00	\$25,000.00	\$25,000.00	\$25,000.00	\$25,000.00	\$25,000.00
Office Equip.	"	5,000.00	72	3,125.00	1,875.00	3,125.00	3,125.00	1,875.00	5,000.00
Auto.	1960-41	2,000.00	09	1,619.90	380.10	380.10	380.10	380.10	380.10
Total (Enter as item 21, page 1)		\$57,000.00		\$29,744.90	\$27,255.10	\$27,255.10	\$29,744.90	\$27,255.10	\$57,000.00

Schedule E—OTHER DEDUCTIONS. (See Instructions 28)

QUESTIONS

- [illegible]

1. Total distributions to stockholders charged to earned surplus during the taxable year:				\$ 61,044.28
(a) Cash				2,154.30
(b) Stock of the corporation				34,761.81
(c) Other property				346.17
2. Contributions (income over 2 percent limitation)				
3. Federal income and excess-profits taxes				
4. Income taxes claimed as a credit in whole or in part in item 45, page 1				
5. Federal taxes paid on tax-free covenant bonds				
6. Excess of capital losses over capital gains				
7. Additions to surplus reserved (not separately):				
(a)				
8. Other non-deductible deductions:				
(a) Life Ins.				
(b) Federal Contrib.				
(c) Non-deductible				
9. Adjustments for treatment of bonds (Itemize):				
(a)				
(b)				
10. Ready credits to earned surplus (Itemize):				
(a)				
11. Excess surplus and undivided profits at close of the taxable year (Schedule L)				66,922.29
12. Total of lines 1 to 11				66,922.29
13. Earned surplus and undivided profits at close of preceding taxable year (Schedule L)				67,387.28
14. Adjusted net income (Item 38, page 1)				28,309.61
15. Nontaxable and partially exempt income:				
(a) Interest on:				
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(2) Obligations of the United States:				
(i) Obligations issued on or before September 1, 1917; all postal savings bonds; Treasury notes issued prior to December 1, 1940, and Treasury bills issued prior to March 1, 1941.				
(ii) United States savings bonds and Treasury bonds owned in the principal amount of \$5,000 or less, issued prior to March 1, 1941.				
(iii) United States savings bonds and Treasury bonds owned in excess of the principal amount of \$5,000 issued prior to March 1, 1941.				
(3) Obligations of instrumentation of the United States:				
(i) Obligations of Federal land banks, joint stock land banks, and Federal intermediate credit banks issued prior to March 1, 1941.				
(ii) Obligations issued by other instrumentation of the United States prior to March 1, 1941.				
(4) Other nontaxable income (Itemize):				
(i) Life Ins. C.S.V. SURF.				30
(ii)				
16. Charges against surplus reserves (Itemize):				
17. Adjustments not recorded or books (Itemize):				
18. Ready credits to earned surplus (Itemize):				
19. Total of lines 15 to 18				28,309.61

EXCESS PROFITS TAX (See instructions for Form 1121)

1. Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? **Yes**
2. If a corporation claiming exemption under section 1227 of the Internal Revenue Code, state basis of claim
3. Is an excess profits tax return being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is less than (1) \$10,000 for a taxable year ending in 1945, or (2) an amount equal to the sum of the portion of \$10,000 applicable to the part of the year falling in 1945 and the portion of \$10,000 applicable to the part of the year falling in 1944, in case of a taxable year beginning in 1944 and ending in 1945, the following Schedule N should be filed in. The completion of Schedule N does not constitute the filing of an excess profits tax return.

Schedule N—EXCESS PROFITS NET INCOME COMPUTATION

1. Excess profits net income (computed without regard for income subject to excess profits tax and dividends received credit) (Item 38, page 1)				
2. Net gain from sale or exchange of capital assets (Item 25 (a), plus Item 26, page 1)				
3. Net gain from sale or exchange of capital assets (Item 25 (a), plus Item 26, page 1)				
4. Adjustments to net gain from sale or exchange of capital assets (Item 25 (a), plus Item 26, page 1)				
5. Total of lines 1 to 4				
6. Dividends received credit adjustment (Item 25, page 1, excluding the sum of (a) dividends received credit and (b) dividends received credit adjustment and (c) dividends received credit adjustment to be computed by a date in 1945)				
7. Net gain from sale or exchange of capital assets (Item 25 (a), plus Item 26, page 1)				
8. Income from retirement or discharge of bonds, etc.				
9. Refunds and interest on Agricultural Adjustment Act loans				
10. Recoveries of bad debts				
11. Total of lines 5 to 10				

12. Excess profits net income (after adjustment for the filing of Schedule N) (See instructions for Form 1121)



Shaffer Terminals Inc.

1945

Depreciable Assets

	1/1/45	12/31/45
Autos	\$ 2,930.09	\$ 2,930.09
Machinery and Equipment.....	49,728.10	50,685.55
Office Equipment	4,604.65	5,358.78
	<hr/>	<hr/>
	\$57,262.84	\$58,974.42

Contributions

Un. Comm. of Slavic Amer.	\$ 50.00
Red Cross	400.00
National Prob. Association	30.00
So. End Boys' Club	100.00
War Chest	600.00
Y.M.C.A.	275.00
Tuberculosis League	5.00
College of Puget Sound	250.00
Tacoma Council of Churches	100.00

\$1,810.00

Labor—Schedule B

Dock	\$ 37,957.97
Payroll	135,911.92
Miscellaneous	5,148.91

\$179,018.80

Less Credit	39,896.19
-------------------	-----------

\$139,122.61

Gross Receipts—Line 4

Loading and Unloading	\$106,696.49
Handling	119,950.16
Miscellaneous	14,826.53
Storage	22,824.28
Wharfage	127,242.42

\$391,539.88

Other Deductions—Line 29

Auto Expense	\$ 1,663.03
Crane Expense	1,437.27
Dues	843.13
General Expense	13,766.24
Insurance	1,215.21
Light, Water and Power	2,048.25
Office Expense	1,981.71
Tractor Expense	8,429.70
Telephone and Telegraph	2,570.26

\$33,954.80

Less Unallowable Dues	661.00
-----------------------------	--------

\$33,293.80

(Duplicate)

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

Tacoma, Wash., Feb. 10, 1949.

In pursuance of the provisions of existing Internal Revenue Laws, Shaffer Terminals, Inc., a taxpayer (or taxpayers) of Tacoma, Washington, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1945, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1950, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

[Seal] /s/ SHAFFER TERMINALS, INC.,
Taxpayer.

By /s/ K. M. KENNEL,
Vice President.

/s/ GEO. J. SCHOENEMAN,
Commissioner of Internal
Revenue.

By /s/ C.R.M.

Feb. 11, 1949.

[Stamped]: Received Feb. 11, 1949, Northwestern Division Seattle office.

(Duplicate)

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

Nov. 23, 1948.

In pursuance of the provisions of existing Internal Revenue Laws, Shaffer Terminals, Inc., a taxpayer (or taxpayers) of Tacoma, Washington, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1945, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1949, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited

from making an assessment and for sixty days thereafter.

[Seal] SHAFFER TERMINALS, INC.,
Taxpayer.

By /s/ K. M. KENNEL,
Vice Pres.-Secy.

/s/ GEO. J. SCHONEMAN,
Commissioner of Internal
Revenue.

By L.C.M.

Nov. 24, 1948.

[Stamped]: Received Nov. 24, 1948, Seattle Division.

Form 1121
Treasury Department
Internal Revenue Service

91

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1945

or fiscal year beginning _____, 1945, and ending _____, 1946

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

Spaßer Terminals

P.O. Box 1157

Tacoma, Washington

Business items listed under entered on page 1, Form 1120. 3018

EXCESS PROFITS TAX COMPUTATION

TABLE 1

1. Excess profits not income (line 18, Schedule A)

2. Available exemption

4. Excess profits credit—based on income (line 48, Schedule B)

1. **Wages profit credit**—based on invested capital (line 40, Schedule C)4. United excess profits credit adjustment (attach schedule)

1. Total of Items 2 to 5

7. Difference between Item 1 and Item 8

Adjusted gross profit net income (Item 7, column 1, or Item 7, column 2, whichever is applicable)

1. In witness of these things I have signed this

Net Income (Loss) 26, page 1, Form 11200

Line 2: Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120, but not in excess of 85 percent of item 10 above (excluding from the computation dividends received on certain preferred stock of a public utility))

(d) Credit for dividends paid on certain preferred stocks if taxpayer is a public utility
(20 percent of line 20, page 2, Form 1120)

Surface net income (computed without regard to the credit provided in section 26 (a) (sum of lines 18 and 21, page 2, Form 1120) and without regard to 80 percent of the credit provided in section 26 (b))

[illegible]

Income tax under Chapter 1 (other than section 102) for the taxable year (item 42, page 1, Form 1120)

Score of Item 13 over Item 14

June 9 or July 15, whichever is later.

Amount delivered by reason of the application of section 710 (a) (5) (relating to abnormality under section 720) (attach schedule)

25 **Answer:** provide same.

(c) Items 16 volume 16 and 17

(d) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule.

For example, if the average is 1.5, and the standard deviation is 0.5, then the range of values is from 1.0 to 2.0.

(portion not used in computing item 42, page 1, Form 1120)

There are 60 values there.

Less: 10% federal income profits tax (10% of Item 18 (a))

Year 23 volume 24 21

Amount, if any, due to application of section 794 (adjustment in case of position inconsistent with prior income tax liability)

(continued)

Enter profit tax due from 22 plus from 23, or from 22 minus from 23, whichever is applicable.

[illegible]

Subscribed and sworn to before me this 14th day of Mar, 1946

Notary Public in and for the State of West. Virg. COMMISSION EXPIRES 12-31-1911

I hereby certify that the above is a true and correct copy of the original as filed in my office.

Subscribed and sworn to before me this 14th day of May 1946

Figure 1. Aerial photograph of the study area. The area is divided into four quadrants by the main road and the river. The area is divided into four quadrants by the main road and the river.

Notary Public in and for the
State of Texas, Holding at
Tampa

BUSCH & WIEB - Tübingen, Bad.



Page 2

Questions

- (a) Date of incorporation 4/16/21.
 - (b) State or country Washington.
 - (c) Collector's office in which your income tax return for the taxable year was filed Tacoma, Washington.
 - (d) Is this a consolidated return? No. If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.
 - (e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b) (4) of the Internal Revenue Code? (Answer "yes" or "no") yes.
 - (f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") no.
 - (g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") no.
- [Sections (1), (2), and (3)—blank.]
- (h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), \$112,532.01.
 - (i) Has a constructive average base period net income under section 722 been used in computing the excess profits credit used on this return? No.
- [Sections (1), (2), and (3)—blank.]
- (j) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income? No. If the answer is "yes," attach schedule showing computation.

Schedule A.—Excess Profits Net Income Computation

Line No.	Column 1	Column 2
	Income Credit Method	Invested Capital Credit Method
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120).....		\$28,309.81
5. 50 per cent of interest on borrowed capital.....		598.88
7. Total of lines 1 to 6.....		\$28,908.69
16. Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15).....		\$28,908.69

18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)\$28,908.69

[Lines 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, and 17—blank.]

Schedule B.—Excess Profits Credit—Based on Income Page 3
[No data supplied in this schedule.]

Page 4 Schedule C.—Excess Profits Credit—Based on
Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

Line No.

1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital.....\$20,000.00

[Lines 2, 3, 4 (a), (b) (c)—blank.]

- (d) Accumulated earnings and profits
(item 4 (a)) as adjusted by item 4 (b) and (c) 42,117.29

[Lines 5, 6, and 7—blank.]

8. Total of lines 1 to 7.....\$62,117.29

[Lines 9, 10, 11, 12, and 13—blank.]

14. Equity invested capital at beginning of taxable year (line 8 minus line 13).....\$62,117.29

Average Addition to Equity Invested Capital During the
Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

[Lines 15, 16, 17, 18, 19, 20, and 21—blank.]

22. Total of lines 14 and 21.....\$62,117.29

Average Reduction in Equity Invested Capital During the
Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

[Lines 23, 24, 25, 26, and 27—blank.]

(See Instructions for Schedule C, lines 28 to 40, inclusive)

28. Average equity invested capital (line 22 minus line 27)\$62,117.29

29. Average borrowed capital
(attach schedule)\$21,980.02

30. Average borrowed invested capital
(50 per cent of line 29)..... 10,990.01

31. Average invested capital (line 28 plus line 30).....\$73,107.30

32.	Total inadmissible assets	\$ 2,400.00
33.	Total admissible and inadmissible assets	\$153,424.73
34.	Percentage which line 32 is of line 33.....	1.564%
35.	Reduction on account of inadmissible assets (1.564 per cent of line 31).....	1,143.40
36.	Invested capital (line 31 minus line 35).....	\$71,963.90
37.	Portion of line 36 (not over \$5,000,000); and credit at 8 per cent.....	\$ 5,757.11
[Lines 38 and 39—blank.]		
40.	Excess profits credit—based on invested capital (total of lines 37 to 39).....	\$ 5,757.11

Shaffer Terminals Inc.

1945

Borrowed Capital

	Reductions	Balance	Days	Prod.
1/ 1/45		\$52,000.00	115	\$5,980,000.00
4/25/45	\$25,000.00	27,000.00	36	972,000.00
5/31/45	20,000.00	7,000.00	153	1,071,000.00
10/31/45	7,000.00			
				\$8,023,000.00
			Average.....	\$21,980.02

Assets

1/ 1/45.....	\$194,317.45
12/31/45.....	112,532.01
	\$306,849.46
Average.....	\$153,424.73

Inadmissible Average	\$2,400.00
Per Cent	1.564

Inventory at beginning of year	1	Salaries and wages	2
Material or merchandise bought for manufacturing or sale	2	Other costs (to be detailed):	3
Salaries and wages	3	(a)	
Other costs per books. (Attach itemized schedule)	4	(b)	
Total	5	(c)	
Cost of goods sold (enter as item 5, page 1)	6	(d)	
		Total (enter as item 5, page 1)	7

.....

[illegible]

State with reason to each item of property reported to Schedule D, (1) how the value of the property was determined, (2) when purchased or, if a contribution, when made, (3) the location of the property, and (4) whether the property was sold, exchanged, gifted, or otherwise disposed of. If the property was sold, exchanged, gifted, or otherwise disposed of, state the date and the value of the property received in exchange therefor. If the property was sold, exchanged, gifted, or otherwise disposed of, state the date and the value of the property received in exchange therefor. If the property was sold, exchanged, gifted, or otherwise disposed of, state the date and the value of the property received in exchange therefor.

Schedule E—INCOME FROM DIVIDENDS			
1. Name and Address of Paying Corporation	2. Domestic Corporations Tangible U.S. Claims to Interest Income (Only)	3. Foreign Corporations	4. Other Corporations
1. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
5. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
6. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
7. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
8. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
9. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
10. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
11. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
12. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
13. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
14. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
15. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
16. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
17. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
18. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
19. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
20. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
21. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	2. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	3. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>	4. <div style="border: 1px solid black; height: 1.2em; width: 100%;"></div>
22.			

Schedule F—COMPENSATION OF OFFICERS					
1. Name and Address of Officer	2. Office Title	3. Paye Forward to Retiree	4. Classification of Compensation & Fringe Benefits		5. Amount of Compensation
			a. Continuity	b. Priority	
W. H. Worthington, Dayton, Ohio, C. E. Juppell	Pres. T. Pres. & Secy	As Sec'y entire			\$ 18,750.00 \$ 2,250.00
Total compensation of officers. (Enter as item 16, page 1)					\$ 21,000.00

Schedule J.—DEPRECIATION. (See instruction 23)									
1. Name of Property (If building, must show date of when constructed)	2. Date Acquired	3. Cost or Other Basis (Include land if depreciable property)	4. Annual Pully De- preciation in Use at End of Year	5. Depreciation Al- lowed for Prior Years	6. Remaining Cost or Other Basis To Be Depreciated	7. Estimated Life in Years	8. Estimated Annual Depreciation	9. Estimated Total Depreciation	10. Estimated Residual Value
Wagon & Trailer	1965/86	629.026.64		642.414.40	686.619.24	15		6.865.14	
"	"	5.492.76		3.897.85	8.204.91	15		170.00	
Truck	1948/41	2.330.00		2.250.40	839.69	4		642.50	
		77.648.40		47.939.65	29.516.94				
Total (Enter on Form 23, page 11)									6.865.14

Schedule E—OTHER DEDUCTIONS. (See instruction 8f)

NORMAL TAX COMPUTATION

	Column 1	Col. 2 Rate	Column 3 Amount of Tax
1. Normal-tax net income (Item 35, page 7)	0		
2. Portion of line 1 in excess of \$5,000 ; and tax at 15 percent	0	15%	
3. Portion of line 1 (in excess of \$5,000 and not in excess of \$20,000) ; and tax at 17 percent		17%	
4. Portion of line 1 (in excess of \$20,000 and not in excess of \$25,000) ; and tax at 18 percent		18%	
5. Portion of line 1 (in excess of \$25,000) ; and tax at 21 percent		21%	
6. Total normal tax (total tax in column 3 of lines 2, 3, 4, and 5)			

DOMESTIC CORPORATIONS WITH NORMAL-TAX NET INCOME OF OVER \$50,000 AND FOREIGN CORPORATIONS ENGAGED IN BUSINESS WITHIN THE UNITED STATES IRRESPECTIVE OF AMOUNT OF NORMAL-TAX NET INCOME

7. Normal-tax net income (Item 35, page 7)	0		
8. Normal tax (24 percent of line 7)		24%	

SURTAX COMPUTATION

9. Net income (Item 31, page 11)	0		
10. Less: Dividends received credit (24 percent of column 9, Schedule B, but not in excess of 45 percent of item 9, page 1 (excluding from the computation certain dividends received on preferred stock of a public utility))	0		
11. Dividends paid on certain preferred stock (if taxpayer is a public utility)			
12. Surtax net income	0		

CORPORATIONS WITH SURTAX NET INCOMES NOT OVER \$50,000

13. Portion of line 12 (not in excess of \$25,000) ; and tax at 6 percent (or 9 percent in the case of a consolidated return)	0	6%	
14. Portion of line 12 (in excess of \$25,000 and not in excess of \$50,000) ; and tax at 22 percent (or 26 percent in the case of a consolidated return)		22%	
15. Total surtax in column 3 of lines 13 and 14			

CORPORATIONS WITH SURTAX NET INCOMES OF OVER \$50,000

16. Surtax net income (line 12 above)	0		
17. Surtax (14 percent of line 16 (or 16 percent in the case of a consolidated return))		14%	
18. Total normal tax and surtax (line 6 or 8, plus line 15 or 17, whichever is applicable)			
19. Total tax (line 18, or the 20 of Schedule C)			

QUESTIONS

<p>1. Date incorporated <u>4/18/21</u></p> <p>2. State or country <u>Washington</u></p> <p>3. If incorporated in 1945, indicate whether (a) completely new business <input type="checkbox"/>; or (b) revenue to previously existing business, which was organized as (1) corporation <input type="checkbox"/>, (2) partnership <input type="checkbox"/>, or (3) sole proprietorship <input type="checkbox"/>; or (c) other (indicate) _____ If successor to previously existing business, give name and address of the previous business organization _____</p> <p>4. Collector's office where the corporation's return for the preceding year was filed <u>Tacoma, Washington</u></p> <p>5. Enter amount of income (or deficit) from line 24, page 1, Form 1120 for 1945 <u>\$28,309.81</u></p> <p>6. The corporation's books are in care of <u>Corp. officers</u> located at <u>Tacoma, Wash.</u></p> <p>7. Enter the approximate number of stockholders at the close of the taxable year <u>3</u></p> <p>8. If the total of line 1 of Schedule M, page 4, is less than 70% of the earnings and profits for the taxable year, state reason for retention of such earnings and profits. (See Instruction 4.) _____</p> <p>9. Indicate whether the corporation is a taxpayer marketing or purchasing cooperative association <input type="checkbox"/>, or a taxpayer's cooperative association <input type="checkbox"/>.</p> <p>10. Is the corporation a personal holding company within the meaning of section 1361 of the Internal Revenue Code? <u>No</u> (If so, an additional return on Form 1120-B must be filed.)</p>	<p>11. Is this a consolidated return? <u>No</u> (If so, procure from the collector of internal revenue for your district Form R-51, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.)</p> <p>12. If this is not a consolidated return: (a) Did the corporation exist at any time during the taxable year 50 percent or more of the taxable stock of another corporation either domestic or foreign? <u>No</u> (If so, attach corporation, individual, partnership, trust, or association return at any time during the taxable year 50 percent or more of the corporation's voting stock? <u>No</u> (If either answer is "yes," attach company's schedule showing (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the individual's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)</p> <p>13. Is this return made on the basis of cash receipts and disbursements? <u>No</u> If not, describe fully in separate statement _____</p> <p>14. Has the corporation in the return taken a deduction for any amount of wages or salaries representing an increase or decrease in value when required approval in order to be deemed useful under the Act of October 3, 1942, as amended, and regulations issued thereunder, or the establishment of rates in new plants or new departments requiring such approval? (Answer "yes" or "no") <u>No</u> If so, attach statement as required by Instructions 16 and 17.</p> <p>15. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower <u>Cost</u> If other basis is used, explain fully in separate statement, giving date inventory was last reconciled with stock.</p> <p>16. Did the corporation make a return of information on Form 1065 or Form 1066 or Form W-2a for the calendar year 1945 (see Instruction C-11)? <u>Yes</u></p> <p>17. Has any transaction described in Instruction C-12 occurred in or after October 8, 1945? (Answer "yes" or "no") <u>No</u></p> <p>18. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? <u>No</u> (If so, attach statement as required by Instruction K-3.)</p>
--	--

ASSETS	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
1. Cash		\$ 22,054.58		\$ 22,054.58
2. Notes and accounts receivable		8,194.50		8,194.50
Less: Reserve for bad debts		24,743.00		13,240.11
3. Inventories	On hand, 1944	948.88		480.41
(a) Raw materials				
(b) Work in process				
(c) Finished goods				
(d) Supplies				
4. Investments in governmental obligations				
(a) U.S. Government bonds, notes, and debentures				
(b) U.S. Government bonds, notes, and debentures, maturing prior to March 1, 1945				
(c) U.S. Government bonds, notes, and debentures, maturing after March 1, 1945				
(d) U.S. Government bonds, notes, and debentures, maturing after March 1, 1945, and of other types				
(e) U.S. Government bonds, notes, and debentures, maturing after March 1, 1945, and of other types, maturing prior to March 1, 1945				
(f) U.S. Government bonds, notes, and debentures, maturing after March 1, 1945, and of other types, maturing after March 1, 1945				
5. Other investments (specify)				
(a) Bonds		2,248.00		13,083.00
6. Capital assets				
(a) Depreciable assets (specify)				
Total depreciable assets		\$ 10,244.42		\$ 77,848.48
Less: Reserve for depreciation		21,241.72		24,412.62
(b) Depreciable assets				
Less: Reserve for depreciation				
(c) Land		2,000.00		1,000.00
7. Other assets (specify)				
(a) Bonds		100.00		8,870.00
(b) Other assets				7,840.00
8. TOTAL ASSETS		\$ 113,011.68		\$ 122,054.58
9. Accounts payable				\$ 11,240.00
10. Bonds, notes, and mortgages payable				
(a) With original maturity of less than 1 year				\$ 100,000.00
(b) With original maturity of 1 year or more				
11. Accrued expenses (specify)				
12. Other liabilities (specify)				
13. Surplus reserves (specify)				
14. Capital stock				
(a) Preferred stock				
(b) Common stock				
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits				
17. TOTAL LIABILITIES		\$ 113,011.68		\$ 122,054.58

Schedule M—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS			
1. Total distributions to stockholders charged to earned surplus during the taxable year			
(a) Cash		\$ 10,000.00	
(b) Stock of the corporation			
(c) Other property			
2. Contributions or gifts (income taxes in net income limitation)			
3. Federal income and excess profits taxes		15,857.82	
4. Income taxes of foreign subsidiaries or United States corporations if treated as a credit in whole or in part in item 37, page 1			
5. Federal income paid on tax-free investment income			
6. Special impairment, more handling in income the value of the property received			
7. Reimbursements, recoveries, and capital expenditures charged to expenses for the books			
8. Insurance premiums paid on the life of any officer or employee whose the corporation is directly or indirectly a beneficiary			
9. Unallowable amounts (incurred in purchasing or carrying exempt income obligations)			
10. Excess of capital losses over capital gains			
11. Additions to surplus reserves (list separately):			
(a)			
(b)			
(c)			
(d)			
12. Other unallowable deductions:			
(a) Divs		244.14	
(b)			
13. Adjustments for tax purposes not recorded on books (specify)			
(a)			
(b)			
14. Excess income to earned surplus (specify)			
(a)			
(b)			
15. Federal surplus and undivided profits as shown by books (list at close of the taxable year)		\$ 27,846.44	
16. Total of items 1 to 15		\$ 27,846.44	
17. Federal surplus and undivided profits as shown by books (list at close of the taxable year)		\$ 27,846.44	
18. Total of items 17 to 18		\$ 27,846.44	



Shaffer Terminals Inc.

1946

Depreciable Assets

	1/1/46	12/31/46
Autos	\$ 2,930.09	\$ 2,930.09
Machinery and Equipment	50,685.55	69,026.64
Office Equipment	5,358.78	5,492.76
	<u>\$58,974.42</u>	<u>\$77,449.49</u>

Line 4—Gross Receipts

Handling	\$55,026.18
Load and Unload	49,647.47
Storage	12,062.41
Wharfage	50,443.84
	<u>\$167,179.90</u>

Schedule B—Labor

Dock	\$34,570.33
Payroll	53,474.57
Miscellaneous	2,705.26
	<u>\$90,750.16</u>
Less Credit	12,180.56
	<u>\$78,569.60</u>

Line 29c—Other Deductions

Auto Expense	\$ 2,506.58
Crane Expense	1,565.91
General Expense	8,534.64
Insurance	1,550.87
Light, Water and Power	1,366.35
Office Expense	1,201.49
Tractor Expense	2,010.88
Telephone and Telegraph	2,407.24
Claims	48.69
	<u>\$21,192.65</u>
Less Contributions	330.00
	<u>\$20,862.65</u>

EXHIBIT D

Form 1065

United States

Page 1

Treas. Dept. Internal Revenue Service

1944

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944

or fiscal year beginning....., 1944, and ending....., 1945

(File this return with the Collector of Internal Revenue not later
than the 15th day of the 3d month following the
close of the taxable year)

(Print Plainly Name and Business Address of the Organization)

Equipment Associates

P.O. Box 1157

Tacoma, Washington

Business or Profession, Renting Equipment.

Item and Inst. No.

Gross Income

1. Gross receipts from business or profession.....\$41,468.32
[Item 2—blank.]

3. Gross profit (or loss) from business or profession
(item 1 less item 2)\$41,468.32
[Items 4 through 12—blank.]

13. Total income in items 3 to 12.....\$41,468.32

Deductions

14. Salaries and wages (do not include compensation
for partners)\$ 360.00
[Items 15 and 16—blank.]

17. Interest on indebtedness (explain in
Schedule F) On Loan..... 228.55

18. Taxes (explain in Schedule C)..... 523.60
[Items 19 and 20—blank.]

21. Depreciation (explain in Schedule E)..... 3,622.28
[Item 22—blank.]

23. Depletion of mines, oil and gas wells, timber, etc.
(submit schedule) Salary of Partner..... 2,400.00

24. Other deductions authorized by law
(explain in Schedule F) Genl. Exp..... 48.97

25. Total deductions in items 14 to 24.....\$ 7,183.40

26. Ordinary net income (item 13 less item 25).....\$34,284.92
[Items 27 and 28—blank.]

Schedules A and B—Blank

Schedule C.—Taxes. (See Instruction 18)

Nature	Amount
Old Age Benefit	\$ 3.60
Unemployment	9.72
Business Tax	510.28
Total (enter as item 18, page 1).....	\$523.60

Schedule D—Blank

Schedule E.—Depreciation. (See Instruction 21)

1. Kind of property, Equipment
2. Date acquired, 10/20/43
3. Cost or other basis, \$19,828.04
4. [Blank]
5. Depreciation allowed (or allowable) in prior years, \$635.30
6. Remaining cost or other basis to be recovered, \$19,192.74
7. Estimated life used in accumulating depreciation, 5
8. Estimated remaining life from beginning of year, 5
9. Depreciation allowable this year, \$3,622.28.

Equipment Associates

1944

Partners' Income

	Share of Profit	Salary	Total
S. B. Stocking, Tacoma, Wash.	\$11,428.31	\$2,400.00	\$13,828.31
K. B. Kennell, Tacoma, Wash....	11,428.31		11,428.31
W. Hopkins, Tacoma, Wash.....	11,428.30		11,428.30
	<u>\$34,284.92</u>		<u>\$36,684.92</u>

Schedule I.—Partners' Shares of Income and Credits. Page 4
(See Instruction for Schedule I)

1. Name and address of each partner, (e) Schedule [Sections (a), (b), (c), (d), (f), and (g)—blank.]

Continuation of Schedule I—Blank

Questions

1. Date of organization, October 1, 1943.
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership.
3. Was a return of income filed for preceding year? Yes. If so, to which collector's office was it sent? Tacoma, Washington.
4. Check whether this return was prepared on the cash [] or accrual [x] basis.

5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower None.
If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock
6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? No.
7. Was return of information on Forms 1096 and 1099, Form W-2 or Form W-2a, filed for the calendar year 1944? Yes. (See Instruction H.)

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

BUSCH & WEBB, Tacoma, Wash.
(Name of firm or employer, if any)

[Remainder of Affidavit—blank.]

EXHIBIT E

Form 1065	United States	Page 1
Treas. Dept. Internal Revenue Service		1945
Partnership Return of Income (To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.) For Calendar Year 1945 or fiscal year beginning....., 1945, and ending....., 1946 (File this return with the Collector of Internal Revenue not later than the 15th day of the 3d month following the close of the taxable year) (Print Plainly Name and Business Address of the Organization)		
Equipment Associates P.O. Box 1157 Tacoma, Washington		
Business or Profession, Renting Equipment.		
Item and Inst. No.	Gross Income	
1. Gross receipts from business or profession.....	\$30,434.96	
[Items 2 through 11—blank.]		
12. Other income (state nature of income) :		
Refund of Business Tax.....	133.11	
13. Total income in items 3 to 12.....	\$30,568.07	

Deductions

14. Salaries and wages (do not include compensation for partners)	\$ 360.00
[Items 15 and 16—blank.]	
17. Interest on indebtedness (explain in Schedule F) ..	179.26
18. Taxes (explain in Schedule C)	254.85
[Items 19 and 20—blank.]	
21. Depreciation (explain in Schedule E)	4,997.56
[Item 22—blank.]	
23. Depletion of mines, oil and gas wells, timber, etc. (submit schedule) Salary as partner	2,400.00
24. Other deductions authorized by law (explain in Schedule F) General Expense	86.24
25. Total deductions in items 14 to 24	\$ 8,277.91
26. Ordinary net income (item 13 less item 25)	\$22,290.16
[Items 27 and 28—blank.]	

Page 2

Schedules A and B—Blank

Schedule C.—Taxes. (See Instruction 18)

Nature	Amount
Social Security	\$ 13.32
Real Estate	241.53
Total (enter as item 18, page 1)	\$254.85

Schedule D—Blank

Schedule E.—Depreciation. (See Instruction 21)

1. Kind of property Equipment
2. Date acquired, 10/23/43 1945
3. Cost or other basis, \$19,828.04 \$10,319.61
4. [Blank.]
5. Depreciation allowed (or allowable) in prior years, \$4,157.58
6. Remaining cost or other basis to be recovered, \$15,670.46 \$10,319.61
7. Estimated life used in accumulating depreciation, 5 5
8. Estimated remaining life from beginning of year, 4 5
9. Depreciation allowable this year, \$3,622.28 \$1,375.28—Total \$4,997.56.

Equipment Associates	Partners' Income			Year 1945
	Share of Profit		Salary	Total
S. B. Stocking, Tacoma, Wash.	\$	7,430.05	\$2,400.00	\$ 9,830.05
K. B. Kennell, Tacoma, Wash.		7,430.05		7,430.05
W. Hopkins, Tacoma, Wash.		7,430.06		7,430.06
		<hr/>	<hr/>	<hr/>
		\$22,290.16	\$2,400.00	\$24,690.16

Schedule I—Blank

Questions

1. Date of organization, 10/1/43.
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership.
3. Was a return of income filed for preceding year? Yes. If so, to which collector's office was it sent? Tacoma, Washington.
4. Check whether this return was prepared on the cash [] or accrual [x] basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower None.
If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock.....
6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "yes" or "no") No.
7. Was return of information on Forms 1096 and 1099, or Form W-2a, filed for the calendar year 1945? Yes.
(See Instruction H.)

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ GEO. J. VANN, 3/14/46.

BUSCH & WEBB, Tacoma, Wash.

/s/ S. B. STOCKING, 3/14/46,
P.O. Box 1157, Tacoma.

[Remainder of Affidavit—blank.]

EXHIBIT F

Form 1065

United States

Page 1

Treas. Dept. Internal Revenue Service

1946

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1946

or fiscal year beginning....., 1946, and ending....., 1947

(File this return with the Collector of Internal Revenue not later
than the 15th day of the 3d month following the
close of the taxable year)

(Print Plainly Name and Business Address of the Organization)

Equipment Associates

P.O. Box 1157

Tacoma, Washington

Business or Profession, Renting Equipment.

Item and Inst. No. Gross Income

[Items 1 through 7—blank.]

8. Rents\$11,725.32

[Items 9 through 12—blank.]

13. Total income in items 3 to 12.....\$11,725.32

Deductions

14. Salaries and wages (do not include compensation
for partners)\$ 360.00

[Items 15 and 16—blank.]

17. Interest on indebtedness (explain in Schedule E;
do not include interest on capital invested in the
business by any partner)..... 69.74

18. Taxes (explain in Schedule B)..... 598.74

[Items 19, and 20—blank.]

21. Depreciation (explain in Schedule D)..... 3,055.29

22. Amortization of emergency facilities
(attach statement) Misc. Exp. 1.46

[Item 23—blank.]

24. Other deductions authorized by law
(explain in Schedule E) Salary of Partners..... 1,050.00

25. Total deductions in items 14 to 24.....\$ 5,135.23

26. Ordinary net income (item 13 less item 25).....\$ 6,590.09

[Items 27 and 28—blank.]

Schedule A—Blank

Schedule B.—Taxes. (See Instruction 18)

Nature	Amount
O.A.B. Taxes	\$ 3.60
Unemp. Taxes	9.72
P. Prop.	507.76
Business	77.66
Total (enter as item 18, page 1).....	\$598.74

Schedule C—Blank

Schedule D.—Depreciation. (See Instruction 21)

1. Kind of property Equipment and Equipment sold at book value
 2. Date acquired 10/1/43
 3. Cost or other basis \$30,147.65 (\$19,828.04)
- [Items 4, 6, 7, and 8—blank.]
5. Depreciation allowed (or allowable) in prior years \$9,255.14 (\$9,214.55)
 9. Depreciation allowable this year \$3,055.29.

Schedules E and F—Blank

Equipment Associates 1946

Partners' Income

	Share of Profit	Salary	Total
S. B. Stocking, Tacoma, Wash.	\$2,196.69	\$1,050.00	\$3,246.69
K. B. Kennell, Tacoma, Wash.	2,196.70		2,196.70
W. Hopkins, Tacoma, Wash.	2,196.70		2,196.70
	<u>\$6,590.09</u>	<u>\$1,050.00</u>	<u>\$7,640.09</u>

Schedule G—Blank

Questions

1. Date of organization 10/1/43.
2. [Blank.]
3. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership.
4. Was a return of income filed for preceding year? Yes. If so, to which collector's office was it sent? Tacoma, Washington.
5. Check whether this return was prepared on the cash [] or accrual [x] basis.

6. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower None.
If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock.....
7. Is any member of the partnership the spouse, son, or daughter of any other member? (Answer "Yes" or "No") No.
8. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No.
9. Was return of information on Forms 1096 and 1099, or Form W-2a, filed for the calendar year 1946? Yes.
(See Instruction H.)

Schedule H.—Balance Sheets

Page 4

	Assets	Beginning of taxable year		End of taxable year
		Amount	Total	Amount
1.	Cash		\$ 8.17	\$ 212.53
2.	Notes and accounts receivable (less reserve)		4,704.88	1,350.00
5.	Depreciable assets Equip.	\$30,147.65		\$10,319.61
	Less: Reserve for depreciation	9,255.14	20,892.51	3,095.88
8.	Total assets		<u>\$25,605.56</u>	<u>7,223.73</u>
				<u>\$ 8,786.26</u>
Liabilities				
9.	Accounts payable		\$ 33.15	\$ 32.25
10.	Notes and mortgages payable		5,250.00	
13.	Partners' capital accounts:			
	(a) S. B. Stocking	\$ 6,774.14		\$ 2,918.00
	(b) K. B. Kennell	6,774.13		2,918.00
	(c) W. Hopkins	6,774.14		2,918.01
			20,322.41	8,754.01
14.	Total liabilities		<u>\$25,605.56</u>	<u>\$ 8,786.26</u>

[Items 3, 4, 6, 7, 11, and 12—blank.]

Schedule I.—Partners' Shares of Income and Credits.

(See Instruction for Schedule I)

1. Name and address of each partner Schedule.

Continuation of Schedule I—Blank

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ GEO. J. VANN.

BUSCH & WEBB, Tacoma, Wash.

[Remainder of Affidavit—blank.]

EXHIBIT G

Form 1065

United States

Page 1

Treas. Dept. Internal Revenue Service

1947

Partnership Return of Income

(FINAL)

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1947

or fiscal year beginning....., 1947, and ending....., 1948

(File this return with the Collector of Internal Revenue not later than the 15th day of the 3d month following the close of the taxable year)

(Print Plainly Name and Business Address of the Organization)

Equipment Associates

P.O. Box 1157

Tacoma, Washington

Business or Profession, Renting Equipment.

Item and Inst. No. Gross Income

[Items 1 through 7—blank.]

8. Rents\$ 912.72

[Items 9 through 12—blank.]

13. Total income in items 3 to 12.....\$ 912.72

Deductions

14. Salaries and wages (do not include compensation for partners)\$ 180.00

[Items 15, 16, and 17—blank.]

18. Taxes (explain in Schedule B)..... 853.50

[Items 19 through 23—blank.]

24. Other deductions authorized by law (explain in Schedule E).....	2.29
25. Total deductions in items 14 to 24.....	\$ 1,035.79
26. Ordinary net income (item 13 less item 25).....	\$ (123.07)
[Items 27 and 28—blank.]	

Schedule A—Blank

Page 2

Schedule B.—Taxes. (See Instruction 18)

Nature	Amount
Personal Property	\$823.37
Business	23.47
Social Security	6.66
Total (enter as item 18, page 1).....	\$853.50

Schedules C, D, E, F, and G—Blank

Page 3

Questions

1. Date of organization 10/1/43.
2. [Blank.]
3. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership.
4. Was a return of income filed for preceding year? Yes. If so, to which collector's office was it sent? Tacoma, Washington.
5. Check whether this return was prepared on the cash [] or accrual [x] basis.
6. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower None.
If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock.....
7. Is any member of the partnership the spouse, son, or daughter of any other member? (Answer "Yes" or "No") No.
8. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No.
9. Was return of information on Forms 1096 and 1099, or Form W-2a, filed for the calendar year 1947? Yes.
(See Instruction H.)

Schedule H.—Balance Sheets

Page 4

		6/30/47 before liquidation	
		End of taxable year	Total
Assets		Amount	
1. Cash		\$ 212.53	\$ 181.24
2. Notes and accounts receivable (less reserve)		1,350.00	
5. Depreciable assets Equip.	\$10,319.61	\$10,319.61	
Less: Reserve for depreciation	3,095.88	3,095.88	7,223.73
8. Total assets		\$ 8,786.26	\$ 7,404.97
Liabilities			
9. Accounts payable		\$ 32.25	74.03
11. Accrued expenses			
13. Partners' capital accounts:			
(a) S. B. Stocking	\$ 2,918.00	\$ 2,443.65	
(b) K. M. Kennell	2,918.00	2,443.64	
(c) W. Hopkins	2,918.01	2,443.65	7,330.94
14. Total liabilities		\$ 8,786.26	\$ 7,404.97

[Items 3, 4, 6, 7, 10, and 12—blank.]

Shaffer Terminals, Inc., vs.

Schedule I.—Partners' Shares of Income and Credits.

(See Instruction for Schedule I)

1. Name and address of each partner	3.*
(a) S. B. Stocking, Tacoma, Wash.	\$ 25.65
(b) K. M. Kennell, Tacoma, Wash.	(74.36)
(c) W. Hopkins, Tacoma, Wash.	(74.36)
Totals.....	\$ (123.07)

* Ordinary net income (item 26, page 1) less any partially tax-exempt interest included in item 7, page 1.

[Columns Nos. 2 and 4—blank.]

Continuation of Schedule I

Partnership Liquidated as of 6/30/47.

Affidavit. (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

BUSCH & WEBB, Tacoma, Wash.
(Name of firm or employer, if any)

[Remainder of Affidavit—blank.]

Filed T.C.U.S. July 5, 1950.

Before the Tax Court of the United States

Docket No. 26127

In the Matter of:

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF HEARING

Room 813, United States Court House

Seattle, Washington

July 5, 1950—2:00 P.M.

(Met pursuant to notice.)

Before: Honorable Luther A. Johnson,

Judge.

Appearances:

Henry C. Perkins,

Of Messrs. Henderson, Carnahan, and

Thompson, 1410 Puget Sound Bank

Building, Tacoma, Washington.

Appearing for the Petitioner.

John D. Picco,

Appearing for the Respondent. [2*]

The Court: The Clerk will call the next case.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Clerk: Docket No. 26127, Shaffer Terminals, Inc. State your appearances, gentlemen, please.

Mr. Perkins: My name is Henry C. Perkins.

Mr. Picco: Counsel for Respondent, John D. Picco.

The Court: Very well.

Mr. Picco: Your Honor, I have a stipulation of facts which I am presenting for filing. I think it might be feasible at the present time to again do as we did this morning, to indicate what exhibits are attached to the stipulation.

The Court: That is a good practice. Let counsel enumerate the exhibits. How many exhibits are there attached to the stipulation of facts?

Mr. Picco: I think about ten, your Honor.

The Court: The stipulation of facts, together with the ten exhibits attached thereto, will be received in evidence, and counsel for the Respondent will now enumerate for the record what the exhibits consist of.

(Whereupon, stipulation of facts, together with ten exhibits attached thereto were received in evidence.)

Mr. Picco: We have attached to this stipulation Exhibit 1, which is a partnership agreement dated September [3] 22, 1943, actually it was executed on October 8, 1943, and it relates back to September 22, 1943.

The Court: What is the style of the partnership?

Mr. Picco: Equipment associates.

The Court: That is Exhibit 1?

Mr. Picco: Yes.

Exhibit 2, your Honor, is a sale and lease agreement. That is the title of it. This was executed October 8, 1943, relating back again to September 30, 1943.

The Court: Sale and lease?

Mr. Picco: Sale and lease agreement.

The Court: Who is the grantor?

Mr. Picco: Shaffer Terminals is the lessor—I mean Shaffer Terminals is the lessee.

The Court: Lessee, yes.

Mr. Picco: And Equipment Associates is the lessor.

Exhibit 3 is a list of rentals paid by Shaffer Terminals, Inc., to the account of leased equipment.

The Court: I think it might be better if we preceded this with a statement of the issues.

Mr. Picco: We can still do that, your Honor, if you desire, although I think it will work out about the same.

The Court: You go ahead, but I think it would have been a lot more logical.

Mr. Picco: Exhibit 3 is a list of rentals paid [4] by Shaffer Terminals, Inc., on account of leased equipment.

Exhibit 4 is a summary of the partnership investments and withdrawals referring to Equipment Associates.

Exhibit 5 is a summary of working capital, having reference to Shaffer Terminals.

Exhibit A, your Honor, is the corporate income tax return for the year 1944, Shaffer Terminals.

The Court: In what year—is that the year involved?

Mr. Picco: That is correct. 1944 and 1945.

Exhibit B, the same for the year 1945.

Exhibit C is the corporate return for the year ending 1946, Shaffer Terminals.

The Court: Is the return made on the calendar year basis, or the fiscal year basis?

Mr. Perkins: The calendar year.

Mr. Picco: Yes, your Honor. Exhibit D is the three year original income tax return. Exhibit D is a photostatic copy of the partnership return for 1944.

Exhibit E is the partnership return for the year 1945.

Exhibit F, same for the year 1946.

And Exhibit G, the last exhibit, same for its final return, which is the period about six months prior to June 30, 1947. [5-6]

I think these are the only exhibits that will be presented.

Mr. Perkins: I believe it is all.

The Court: Now, if you will state what the issues are.

Mr. Perkins: I am ready to make my opening statement now.

The Court: Petitioner's counsel may be heard first.

Opening Statement on Behalf of the Petitioner
By Mr. Perkins:

I might state that the name of Mr. Anderson appears upon the petition. He has been ill recently, and couldn't be here today.

The name of George A. Bush, appearing also, also is on the petition. Mr. Bush is here as a certified public accountant. The returns were all made under his direction and his office, and any questions about figuring is in his department.

This case involves the deductibility of the return—of rentals after repaid by the Petitioner, for the use of equipment during the years 1944 and 1945, totaling \$61,000. The Commissioner has disallowed this item for both years, and that results in a proposed deficiency for the two years.

The Court: On what ground did the Commissioner disallow it? [7]

Mr. Perkins: The ground was that they were not properly deductible as business expense.

The Court: Is there any question about them being rented?

Mr. Perkins: No, there is no question about the fact that the money was paid.

The Court: **For rental?**

Mr. Perkins: That is right. He raised the question whether or not it was really a deductible item. The original case was McGovern and Hatton, that was a case where the court found that there was no real lease between the corporation and the resident.

The Court: I recall.

Mr. Perkins: That was the original idea under which it was disallowed. I believe now the government will rely on cases like the Skeb case, that has

resulted in the proposed deficiency, which is the basis for this case.

Shaffer Terminals, the Petitioner, were in the business of operating terminals, warehouses, at Tacoma. During the period here involved, 1944 and 1945, and 1942 and 1943, they were engaged in handling freight for—primarily for the Army, Navy, Lend-Lease equipment to Russia, et cetera. The amount of business that they were doing was increasing rapidly, they needed more equipment, especially where—what is called the lift truck, they were renting these lift trucks [8] from the Army and other stevedoring companies, but the availability of these machines was becoming more precarious. The people they were renting them from were asking when they could get them back, et cetera, and those conditions just increased rapidly.

They decided that they had to get a more available source of this equipment. They applied for priorities in the name of Shaffer Terminals, knowing that Shaffer Terminals had a standing to get the priorities during the war, but they never considered that Shaffer Terminals would ultimately buy them, because their working capital was already been—already being stretched too far. Due to large accounts receivable, and they are all listed in the exhibits attached to the stipulation, and they were in the 90 per cent bracket of income tax, which made it not feasible for them to expect to pay back out of earnings. But feeling that the important thing was to get the equipment, they applied for the priorities, and obtained the priorities.

When the time came to pay for the equipment, they had consulted the banker, whose deposition was taken, and will be in evidence, and as a result of that, Shaffer Terminals wrote the checks.

Before the checks returned to Tacoma for payment, the new partnership, composed of four stockholders of Shaffer Terminals, had given the Shaffer Terminals a check [9] for the full amount of the machines, plus freight.

The Court: What is the name of the three partners?

Mr. Perkins: Equipment Associates. A copy of the partnership agreement is attached to the stipulation. In other words, while a Shaffer check was used in two cases, the check was covered before it came back for payment. In the third case, there was a lapse of about three weeks, and at that time Shaffer Terminals had to carry a large reserve for income tax, et cetera.

The only reason the Shaffer Terminals appears in it as buying the lift trucks, they could get the priorities easily. The petitioner never used these except as lessee, under the agreement attached to the petition.

Now, on page 2 of the stipulation there is a list of shareholders. There were originally four. R. Shaffer died. There were Stocking, K. M. Kennell, and W. Hopkins, were the three stockholders, during this period of 1944 and 1945, and their stockholdings varied from Stocking's 78 per cent, down to Mr. Hopkins' 8 per cent. Those three were also the three partners. They shared the partnership income

equally, except for the part that Mr. Stocking received a salary for managing the affairs of the partnership of \$200 per month.

Now, the rentals which were paid by Shaffer Terminals to Equipment Associates for the use of this [10] equipment——

The Court: In the case here, it involves as to whether or not that was rentals?

Mr. Perkins: That is the question. Were these proper deductions for business expense. The size of those rentals were determined by tariffs on file with the Public Service Commission of the State of Washington, the same amount that every other company was paying for similar equipment, and the same amount that Shaffer Terminals had been paying the Army for the same equipment before acquiring their own. That is the question, whether or not those rentals which totaled over \$61,000, were properly deductible from the income tax for those years.

That is the only question involved here. I wonder if I made clear that the partners and shareholders were the same, but their interests were different?

The Court: I understand.

Mr. Perkins: They were equal, Sam Stocking, 78 per cent; Keller, 14 per cent; Hopkins, 8 per cent, but they shared equally, except for the fact that Mr. Stocking was paid a salary of \$200 a month to manage.

I would also add that a salary of \$30 a month was paid to Mr. E. A. Seaton for keeping the books. He—E. A. Seaton was also the bookkeeper for the Petitioner.

The affairs of the partnership were conducted in [11] the Shaffer Terminals office, for which no rent was paid.

Mr. Picco: Your Honor, I think he has covered the case very well. We have here the Petitioner, the corporation Shaffer Terminals, they sold the equipment in question to a partnership composed of the sole stockholders and sole officers of that corporation, doing business as a partnership formed in that year, September, 1943.

In that same transaction, covered by the same agreement——

The Court: Two tax periods, 1944 and 1945.

Mr. Picco: In the same transaction, covered by the agreement in 1941 or 1942, this partnership leased back the equipment to the Petitioner.

We have a case that comes squarely within the Arnston decision. I think you are quite familiar with that. The case was presented in the stipulation and comes within the Arnston case, probably the Inger case, and a few others, but definitely the Arnston case, and the Inger case.

I think that should be sufficient to let your Honor know the type of case you have before you. Outside of that, I think we are ready for testimony.

K. M. KENNEL

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows: [12]

Direct Examination

By Mr. Perkins:

The Clerk: Will you state your name, please?

The Witness: K. M. Kennell.

The Clerk: And your address?

The Witness: 3715 East L Street, Tacoma.

Q. (By Mr. Perkins): What is your business, Mr. Kennell?

A. Vice president of Shaffer Terminals.

Q. And were you vice president in 1942 and 1943?

A. No, sir. At that time I was secretary, until after the death of Mr. Shaffer in 1943, then I became vice president.

Q. You became vice president in 1943, and you have been such ever since? A. That is right.

Q. In the year 1942, of what did your business consist?

A. In the first part of 1942, business was—it dropped off to almost nothing, because of the war.

The Court: What business was that company engaged in?

Q. Describe the type of business.

A. We were a marine terminal and a wharf freight, operating, loading ships. During the first six months of 1942, [13] business dropped off almost

(Testimony of K. M. Kennell.)

to nothing, because of interruption to normal freight routes, due to the war. In the beginning of July, 1942, we started handling different cargoes, and for the Alcan Highway, and Lend-Lease cargo destined to Russia. That continued through 1942, and on through 1943, and subsequent years.

Q. Was your business increasing?

A. Business increased then very rapidly.

The Court: When did the increase begin?

The Witness: In the middle of 1942.

Q. And did it increase up through the fall and winter?

A. It increased continuously from that time on.

Q. What was your situation with respect to equipment for loading?

A. At the beginning of the Lend-Lease cargo, we required a great deal of additional equipment. The Army cargo for the Alcan Highway didn't require so much new equipment.

The Court: What kind of cargo was loaded primarily at that time?

The Witness: It was about half and half.

The Court: What was the nature of the cargo?

The Witness: The cargo for Lend-Lease started out to be foodstuffs, and then stretched into trucking equipment, and all types of trucks, machinery, almost [14] everything imaginable.

Q. Will you tell what the situation was with respect to equipment necessary for unloading this freight?

A. When I undertook the Lend-Lease operation,

(Testimony of K. M. Kennell.)

we had practically no equipment of the type that was necessary to handle it, and we simply had to go to mechanically handling it. That meant the requisition of the necessary pallet boards to go with the type of operation. We started out with belt pallet boards, and we had to get lift trucks.

The Court: You started with what?

The Witness: Pallet boards.

Q. Will you explain what those are?

A. Those are boards that cargo is loaded when it comes through from a car, and then are transferred by the fork truck to the ship side and then into the hold of the ship. They are a handling device for economy in handling.

We had no lift trucks, and at that time application was made to a department of the Army for lift trucks for that operation.

The Court: What did you call those?

The Witness: Lift trucks.

The Court: Explain those things, because the court doesn't know much about sea shipping.

The Witness: The Army granted us the use of three lift trucks, which we used for a considerable period [15] of time. They rented us—they rented those to us, but with the understanding that they were in temporary assignment until we could acquire equipment of our own.

Q. What rental did you pay to the Army?

A. We paid the standard rental of three dollars per hour.

Q. That is the standard tariff?

(Testimony of K. M. Kennell.)

A. That is the tariff charges. In addition, we had to guarantee them a specific rental allowance per month, as well, used or unused.

The Court: The agreements about those matters are tied in, in the stipulation of facts, weren't they?

Mr. Perkins: Yes, the stipulation says that the rentals paid were the tariff rentals on file.

In other words, there are some cases where there was some question about the amount of rental paid, and I just wanted to leave that and have that checked.

Q. (By Mr. Perkins): You were telling about the difficulty with equipment. Go ahead.

A. We acquired these trucks, but it was with the understanding that they were temporary only, until we could acquire equipment of our own.

During the period that we had them, we were continually under pressure to return them to the Army, for use elsewhere, but we had to have them in the work to take care [16] of the cargo destined to get to Russia.

Q. When, if at all, did you start making plans to acquire another source of machinery?

A. Early in the year of 1943.

Q. Yes.

A. I knew that we were going to be faced with outmoded business, because half of the terminals by one of the shipyards was a warehouse and it was the intention of the army to reclaim that and put it under contract operation to handle Lend-Lease cargo. We knew from that, as well as the materials,

(Testimony of K. M. Kennell.)

that we would probably be handling, that we had to have new equipment. During that time they were leasing some equipment from stevedores, all we could get then, or, however, that source was all together too unsatisfactory, because the stevedores were entering into contracts for handling various types of operations in various places, and would require their own equipment.

Q. Now, may I just ask one question: You refer to all the active members—— A. Yes.

Q. ——at that time, with whom you discussed matters?

A. The entire group of us, Mr. Shaffer and Mr. Stocking and Mr. Hopkins and myself, primarily Mr. Stocking and myself.

Q. Mr. Shaffer has died since?

A. Yes. [17]

The Court: Where are you located? Where was this shipping carried on?

The Witness: Tacoma, Washington.

Q. You go ahead, continue with the story about the equipment. You had arrived at the point where you had decided that you had to have another source of equipment.

A. We began to consider ways and means by which equipment could be acquired, but knowing our position as far as the limited capital of the corporation went, we could not see a possibility of the corporation itself acquiring this equipment. We discussed several means by which the equipment

(Testimony of K. M. Kennell.)

might be acquired, but the pressing thing before us always was the fact that we had to have it.

And before we had come to any conclusion as to how we were going to finance the equipment, we had to apply for priorities and get the equipment rolling, because time was of the essence.

Q. Did you apply for those priorities?

A. We applied for those priorities in April of 1943. They were granted in the same month, as I recall it. And delivery was obtained of the equipment, three pieces of equipment, the latter part of September of that year.

Q. Can you tell when you decided to organize the partnership, which you did ultimately organize, and the circumstances under which you decided that? [18]

A. As I recall it, our thinking on the partnership crystalized in August of 1943, but until that time we had been discussing various ways of financing it, including the consideration of getting outside capital to invest in them and from whom we might rent.

Q. Did you consider having Shaffer Terminals borrow the money?

A. Yes, that was considered and abandoned because we were already borrowing as heavily as we could hope to, from the bank, because of the tremendous amounts of accounts receivable we were having to carry.

Q. What was the capital of the corporation at that time, \$20,000?

(Testimony of K. M. Kennell.)

Mr. Perkins: It will be in the stipulation.

Q. (By Mr. Perkins): At that time, did you consult Mr. Barry, with respect to this problem?

A. That was done.

Q. And as a result of that, the partnership was organized?

A. Out of the thinking that we had done on all related subjects, we decided finally that a partnership was the solution to our problem.

Q. Did you consider that the Shaffer Terminals did buy this equipment? A. No, sir. [19]

Q. Did Shaffer Terminals ever use this equipment before the sale and lease agreement was made?

A. No, it did not.

Q. At that time, who was your attorney?

A. Mr. Henderson.

Q. And who attended to your tax returns, your accountant? A. Mr. Bush.

Q. Did you consult either of them with respect to any tax problem involved in this arrangement?

A. Didn't even consider that.

Q. Did you own the premises at Tacoma where you operated the terminal?

A. No, sir; they were on leases.

Q. On leases. I believe I have asked this question. I just want to clarify it. Did you at any time ever consider that Shaffer Terminals did buy this equipment for their own account? I believe that is a question I asked before. A. No, sir.

Q. Will you explain just again why you never considered that?

(Testimony of K. M. Kennell.)

A. The answer was rather obvious. The corporation's net returns in any year during that period could not possibly sustain the investment that would be necessary in equipment. We had no reserves from which to draw, in addition to [20] which, we were buying equipment which was to be used in the war effort. A use for it might be ended at any time. It was in this Lend-Lease operation with Russia, to Vladivostok and similar points on the Pacific Coast of Siberia. The threat of the Japanese interrupting that Lend-Lease line was ever present, and no one knew from one day to the next whether that line was going to be permitted to stay open or not.

Mr. Perkins: I believe that is all.

Cross-Examination

By Mr. Picco:

Q. I have just one preliminary question before going into cross-examination, and that is as to the equipment. In the stipulation we state here that prior to September 22, 1943, that is when the partnership was formed, Petitioner had purchased and owned a considerable amount of this equipment. I want you to go into that slightly. You did have some equipment prior to the formation of the partnership, did you not?

A. The Shaffer Terminals had equipment of various types that it acquired through the years of its operation.

(Testimony of K. M. Kennell.)

Q. You needed additional equipment at this time? A. Yes, sir; and of a new type.

Q. Thank you. Now, at the time that the partnership was formed, in September of 1943, Shaffer Terminals was not in any financial difficulty, was it?

A. No. [21]

Q. In fact, its cash position was rather good in September of 1943, was it not?

A. I would have to review all the statements there to elaborate on that, but our business was up and down from one month to another, or we changed very radically from one month to another.

Q. The first equipment that was transferred from the Shaffer Terminals to the partnership cost around \$9,500? A. That is right.

Q. Now, it is true, isn't it, that your cash position at that time was \$28,000, or over that?

A. It is there in the stipulation, sir. I don't recall the figures exactly.

Q. Also, that the accounts receivable stated by the company on the contracts at that time, exceeded \$134,000? A. That is substantially correct.

Q. You had up to that particular time sufficient equipment with *which you* to comply with your commitments under the war contracts, did you not?

A. No, we did not. We were working with our bare hands.

Q. You needed additional equipment?

A. And we had to have equipment.

Q. You needed \$9,500 more additional equipment at that particular time? [22]

(Testimony of K. M. Kennell.)

A. We needed more than that.

Q. But that is what you did buy?

A. That is right.

Q. You had war contracts that were promising to keep income coming in for several years at that time?

A. No, we had no contracts.

Q. Weren't you operating under the war contracts?

A. We operated under no contracts, sir.

Q. What sort of arrangement did you have with the government?

A. We simply had the arrangement under which we handled cargo they sent to us day by day.

Q. But you expected and contemplated and expected that this arrangement would continue during the duration of the war period, did you not?

A. In part, that may be true, sir, but as I explained in answer to the question a moment ago, no one knew how long the Russian supply line would be left open, that was in the hands of the Japanese.

Q. At the time you first formed this partnership, there was no necessity, was there, to borrow money as far as Shaffer Terminals was concerned, that is, in order to purchase the equipment?

A. Yes, I think there was.

Q. Well, you just got through saying that the cash [23] position was over \$28,000 at that time, and the equipment didn't cost more than \$9,500?

A. That is true, sir, but at the same time I also pointed out that the fluctuations in the amounts that were due us and our cash position——

(Testimony of K. M. Kennell.)

Q. You also stated that you had war priority, that is, Shaffer Terminals had war priority necessary to obtain any equipment they might need in this emergency?

A. We could get the priority because of the work we were doing.

Q. Now, this new partnership that you formed was not in that sort of position, was it? It couldn't get the priority?

A. I found out that we could have gotten the priority, but it would have taken more time.

Q. You don't know whether it could have gotten the priority?

A. Well, knowing that other cases of similar kind did get it, I assume that we could.

Q. In any event, in all these three transfers, during the two years involved here in 1943, and in March of 1944 and in June of 1945, the priorities were obtained by Shaffer Terminals, they bought the equipment and transferred it over to the Equipment Associates, a partnership. Is that right? [24]

A. That is right.

Q. Why was it necessary to form this partnership, if all the answers you have given me are true?

A. The answer, Mr. Picco, is quite obvious. That is, that our net position was not going to be sufficient to permit us to finance this equipment, plus other equipment that was contemplated with other business that was being considered for us by the Army and others, and the necessity of tying up so

(Testimony of K. M. Kennell.)

much of our funds in the nature of accounts receivable and other forms of working capital.

In other words, the Shaffer Terminals did acquire a certain amount of subsidiary equipment on its own account.

Q. Actually, wouldn't it have been feasible for Shaffer Terminals to purchase its own equipment, rather than to deal through this partnership?

A. No.

Q. You know, do you not, that during the years 1944 and 1945, the tax years, rentals paid by the Shaffer Terminals for the use of this equipment exceeded over \$77,000? A. That is right.

Q. And the purchase price of this equipment did not exceed \$30,000?

A. By the same token, the amount that we paid the Army for similar equipment at the same times was in the same proportion— [25]

Q. That is not in response to my question. My question is, it would have been cheaper to purchase the equipment, for Shaffer Terminals to purchase the equipment, rather than to deal through this partnership?

A. If the Shaffer had been—if the Shaffer Terminals had been financially in a position to do so.

Q. You knew at the time of these transfers that the cash position, the accounts receivable were large in relation to the price paid for the equipment?

A. That is true, sir, but we had no way of knowing when those accounts receivable would be paid, and I had no way of knowing how much the banks

(Testimony of K. M. Kennell.)

would go with us to carry our accounts receivable.

Q. On the basis of \$134,000 accounts receivable, it was necessary to borrow, you mean, you don't think your banker would have loaned \$9,500 to buy your equipment, is that what you want us to believe?

A. That is not the point, sir. The point is, how much would they loan on our total needs?

Q. Weren't you thinking, when you say Shaffer Terminals wasn't in a position to finance you, weren't you thinking in terms of the end of the year, after taxes had been paid?

A. At the end of the year; yes, sir; after the taxes were paid, there would not be enough to carry the finances.

Q. Actually, is it not true that the only reason for [26] forming that partnership was to operate the excess profit tax from these payments?

A. Had that been our intention, sir, we would have changed our corporation to a partnership and taken the benefit of it on all our other transactions.

Q. That was one of the reasons for the formation of the partnership, was it not?

A. A matter of being able to accumulate sufficient funds to buy equipment and to carry on.

Q. Now, as far as the partnership is concerned, how much capital was contributed by the individual partners?

A. In the first instance, \$2,500 each.

Q. That is \$10,000 total capital?

A. That is right.

(Testimony of K. M. Kennell.)

Q. Now, it is true, is it not, that the Shaffer Terminals on that particular day had three times more cash than the partnership had?

A. Are you looking at the amounts that we had opposite that cash?

Q. Yes, I am.

A. \$28,000 would be three times that much.

Q. Just for the purpose of getting it before the judge, on September 30, 1943, your bank balance was \$28,683. This is Shaffer Terminals. Your accounts receivable were \$134,756. Your debts payable were \$35,000. Your accounts payable were [27] \$37,538. Then some reserves for social security and income tax of \$13,293. The answer is that the Shaffer Terminals had two or three times more cash than the cash capital of the partnership on that date, did it not?

A. That is true, but we also had liquid liabilities against that.

Q. I wonder if you would tell us a little about the source of this capital?

A. Well, in my own instance, I borrowed roughly two-thirds of it, and had the rest myself.

Q. Do you know about whether or not the other two, Mr. Stocking and Mr. Shaffer, whether they had to borrow?

A. I know that Mr. Stocking had to borrow part of his. I am under the impression that Mr. Shaffer also borrowed part of his. Mr. Hopkins, I think, did not.

Q. Did you consider at this time having the

(Testimony of K. M. Kennell.)

Shaffer Terminals borrow the \$9,500 that was necessary to buy the equipment?

A. We had discussed that with the bank.

Q. There was no question that that loan could have been obtained through the bank, is there?

A. There is a question.

Q. In what regard?

A. As a matter of fact, the bank definitely indicated that they were not in a position money beyond what loans they [28] were carrying for this equipment. It was a capital loan, and they couldn't see where we could own the money to get it back.

Q. For one thing, it wouldn't have been necessary for Shaffer Terminals to borrow any money at that particular time, that is correct, is it not?

A. I don't think that is true, because we were already borrowing \$35,000, according to the statement you have, sir.

Q. The statement that is in here is that you had at that time over \$28,000 in cold cash?

A. Our pay rolls in any week would eat up half of that.

Q. But at this particular time, you did have the cash?

A. On that day, at the end of the month, that is true. The statements showed it on one day.

Q. Did your banker state he wouldn't loan to the corporation, knowing that the liquid position of this corporation was as I have just recited it?

A. He didn't say he wouldn't loan at all. He said it wasn't the proper loan to make at that time.

(Testimony of K. M. Kennell.)

Q. Would you please tell us how you were able to pay back your loan?

A. Yes. I paid it back out of my salary, and some of it out of the earnings of the [29] partnership.

Q. The earnings of the partnership comprised in the main, in fact, practically all of the earnings of the partnership comprised rental payments made by Shaffer Terminals, did they not?

A. Practically all.

Q. So in truth, the capital contribution was borrowed from the bank and paid out of the rental payments made by the corporation, the Shaffer Terminals, the petitioner in this case?

A. In part.

Q. I wonder if you would tell us a little about what the partnership did during these two years that are in question. What did the partnership have to do?

A. Its business was to acquire and supply the equipment.

Q. It was not contemplated, was it, that the partners were to devote any appreciable time to the business of the partnership?

A. No, it was not.

The Court: I didn't get the answer.

The Witness: It was not.

Q. What actually are some of the duties of the partnership in connection with their business? The business of the partnership?

A. The business of Mr. Stocking, it was his

(Testimony of K. M. Kennell.)

business [30] to manage the affairs of the partnership, make any necessary banking arrangements and other affairs of that sort, administering the business, looking after the details of the contracts, and other things that were to be entered into.

Mr. Picco: Is Mr. Stocking going to testify here today?

Mr. Perkins: Yes.

Mr. Picco: I will ask him further along that line.

Q. (By Mr. Picco): Why was Mr. Stocking selected as the man to manage the partnership?

A. Probably logical because at the moment he had more time than any of the rest of us to devote to it.

Q. The duties involved in managing the partnership could have been handled by either yourself, or Mr. Hopkins, for that matter, too, could they not? A. Presumably.

Q. Now, this particular equipment was used exclusively by Shaffer Terminals?

A. It had first priority, it was not used exclusively. There were instances where it was rented to other people. When the Shaffer Terminals had no need for it.

Q. Do you remember any of those instances?

A. There is a statement in these stipulations, I believe, to the effect that rentals acquired from outside sources—— [31]

Q. That equipment could not have been used by

(Testimony of K. M. Kennell.)

any other person without the permission of Shaffer Terminals?

A. He arranged the contract under which the equipment was leased to Shaffer Terminals in that manner, because of the fact that it protected the priorities.

Q. So that written approval, or at least approval and consent was necessary before anybody else could use that equipment? A. That is right.

Q. The partnership, equipment associates, was never intended, was it, to have unrestricted right to control over the equipment?

A. I don't know that I understand your question, sir.

Q. The question is this: This equipment was to be used by Shaffer Terminals at all times during the period of the sale and lease agreement, is that correct? A. That is correct.

Q. In other words, the partnership was not free to dispose of the equipment or use the equipment in any way? A. That is correct.

Q. During this period, Mr. Kennell, at any time during this period of 1944 and 1945, you and Mr. Hopkins and Mr. Stocking could have agreed to release the two parties to the contract at any time, is that right?

A. Yes, that could have been done. [32]

Q. The sale and lease agreement could have been terminated at any particular time?

A. That is right.

Q. The rentals that were provided for and speci-

(Testimony of K. M. Kennell.)

fied in the agreement, that is, the lease agreement, could have been changed at any time?

Mr. Perkins: I object to that. That is set up by the tariff of Washington State.

Mr. Picco: That could have been done by contract, your Honor.

Mr. Perkins: In violation of the State of Washington statute.

Mr. Picco: I will change the form of the question.

Q. (By Mr. Picco): Any term in that lease agreement could have been varied at any particular time by Mr. Stocking, yourself, and Mr. Hopkins?

A. Allowing due consideration for the priorities under which the equipment was received, the amendments could have been made to the agreements.

Q. In fact, any obligation under that lease could have been cancelled or terminated at any particular time? A. I think that is true.

Mr. Picco: That is all.

Mr. Perkins: I have just one question, Mr. [33] Kennell.

Redirect Examination

By Mr. Perkins:

Q. You said that Shaffer Terminals had equipment, but you needed more equipment of a different type? A. That is right.

Q. Can you elaborate a little bit on that, to explain what you mean by that?

A. Our situation was this: Palletized handling

(Testimony of K. M. Kennell.)

was coming in. It was the only way to economize on labor, which was short on the market. We had one ancient type fork-lift truck, but we had no other equipment of that type. So we had to acquire lift-trucks and the necessary pallet boards to complement them, to take care of the increased volume of movement.

Q. Was this lift-truck type of equipment of a more expensive nature than you had been accustomed to accumulate over the years?

A. Very much more so.

Q. Then is my conclusion right, that you were going into an entirely different type of equipment of a much more expensive nature?

A. That is correct, sir.

Q. And that was the purpose of Equipment Associates, as you saw it?

A. That is right. [34]

Mr. Perkins: That is all.

(Witness excused.)

SAMUEL B. STOCKING

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Perkins:

The Court: State your name and address, please.

The Witness: Samuel B. Stocking, 11518 Gravelly Lake Drive, Southwest, Tacoma.

(Testimony of Samuel B. Stocking.)

Q. What is your occupation, Mr. Stocking?

A. I am president of Shaffer Terminals at the present time and the Pacific Stock and Distributing Company also.

Q. In 1942, 1943, 1944, and 1945?

A. I was vice-president and general manager of Shaffer Terminals, until October of 1943, when Mr. Shaffer died. I then became president at the next meeting of our stockholders.

Q. From 1943 to that—to the end, say, of 1946, were you actively connected with Shaffer Terminals? A. Very much so.

Q. Am I right in thinking you and Mr. Kennell were the two who gave practically all your time to the business during those years?

A. We did, entirely. [35]

Q. You have heard Mr. Kennell testify about certain aspects of the business in those years, is there anything in connection with that you would like to comment upon, or vary in any way?

A. Only that we acquired at that time, or thought that we were going to acquire a lot more of this type of equipment for improvement of the Milwaukee Terminals, which never came about. But if it had come about we would have had required \$50,000, instead of \$9,000 which we put in. But also a very important part of the thinking at that time was the legality of the matter, which loomed large in my mind.

Q. You were the one that secured the priority?

A. I wrote letters from everywhere—the Navy,

(Testimony of Samuel B. Stocking.)

the Army, and also the War Shipping Administration—I got letters even from the Chief of the Soviet Purchasing Commission of Seattle, and from the Miller McCormick Steamship Company, I guess that I had seven letters on that priority that went into Washington into April.

Q. You spoke of the possibility of the improvement of an adjoining dock which would require much more equipment than you eventually acquired through the partnership. Was that possibility present during the spring and summer of 1943?

A. It certainly was. Very much so.

Q. You were considering that at the same time, when you were considering the matter of financing equipment which you [36] financed through the partnership?

A. That is true.

Cross-Examination

By Mr. Picco:

Q. Mr. Stocking, you say that you and Mr. Kennell were the active members of the Shaffer Terminals in 1943?

A. After Mr. Shaffer died. Mr. Shaffer was convalescing from a very serious operation and wasn't available for consultation, and—we did consult with him frequently—and he at times came to the office, dictated letters, but the actual operation of the affairs from an operating standpoint were in Mr. Kennell's hands as chief operating officer, and Mr. Hopkins was general superintendent, with me as president of the company, looking after general

(Testimony of Samuel B. Stocking.)

matters of finance, and public contacts and government contacts, and that sort of thing.

Q. Was Mr. Shaffer very active at the very end?

A. Well, a man who had had a cancer operation two years before was mentally alert still, but under constant pain, and we tried to limit his presence with the company as to the smallest possible time. And he used to go to his house very often at Adelaide, which is seven or eight miles out towards Seattle, and he came to the office quite frequently, so that his activity with us was limited to his physical strength. [37]

Q. He had been slowing down, you say, in the two years prior to that time, I take it?

A. Yes, he was operated on in October, 1941, and died shortly after this contract was signed, in October, 1943.

Q. What duties and functions did you perform as managing partner of the Equipment Associates?

A. Well, I set the thing up in the first place, and spent a lot of time determining the propriety of transferring priority from Shaffer Terminals to the Equipment Associates, or whatever means we might use of financing this purchase, which was absolutely necessary. And the general operations of the Shaffer Terminals were dovetailed with the Equipment Associates, you might say, were pretty much dovetailed in all my activities.

Q. Outside of setting the partnership up, what

(Testimony of Samuel B. Stocking.)

were some of your functions as managing partner, after the partnership was formed?

A. Well, there were certain things we did. We had to replace any parts—the Shaffer Terminals only paid ordinary operating wear and repair, the same as our government contracts were for the government trucks. But if any pieces broke down, or if we had to hurry up and get something from Battle Creek, Michigan, and some of those trucks I had to move after that, there are a number of cases where I spent considerable time. [38]

Q. Were you operating then as managing partner?

A. Yes.

Q. Or as an officer of Shaffer Terminals?

A. I was operating as managing partner, from the start of Equipment Associates, yes.

Q. I mean when you ordered parts, weren't you operating as officer of the Shaffer Terminals?

A. I wouldn't say I was.

Q. I understand Shaffer Terminals were required to replace——

A. Yes, but that doesn't mean major parts.

Q. Would you say that your duties were such as managing partner that only you could have handled that phase of it?

A. The other fellows were working night and day and Sunday trying to keep cargo going to Russian ships. Hopkins, our general superintendent, retired at seventy, because he was being overworked. I don't believe I could have expected them to do it.

(Testimony of Samuel B. Stocking.)

Q. Then, Mr. Stocking, you were selected because you didn't have as much to do as the others?

A. I had plenty to do, but I didn't have as much, and I wasn't as close to the actual feeding of the cargo to those ships, and those boys were. You see, we didn't operate the actual ships, only the dock. [39]

Q. You received some salary for you——

A. I did; yes, sir.

Q. Tell us—\$2400?

A. \$2400 a year, \$200 a month.

Q. Wasn't this salary excessive for the type of work you had to do as managing partner?

A. I don't think so. That is the only salary the partnership paid out. I think a fellow who had been on the waterfront as long as I had, since 1907, had something on the ball, could keep things going, I don't think the salary was excessive.

Q. It is difficult for me to visualize what you were to do in this business.

A. We were serving the Army, Navy, and Lend-Lease, and everybody that needed service on the dock. We were operating strictly on a tariff, we weren't operating on a cost-plus basis. Believe me, those were strenuous days.

Q. I appreciate that. These things you are talking about, weren't they your actual task as an officer of Shaffer Terminals? A. What, sir?

Q. Weren't you performing these tasks as an officer of Shaffer Terminals?

(Testimony of Samuel B. Stocking.)

A. Those that I had performed for Equipment Associates I would say no. [40]

Q. Equipment Associates had no office except the office of Shaffer Terminals?

A. That is true.

Q. They had no employee except Seaton. Is that right? A. That is right, and myself.

Q. Seaton was the bookkeeper for Shaffer Terminals? A. That is right.

Q. You were receiving \$9,600 as salary as an officer of the Shaffer Terminals?

A. That is right.

Q. Would you like to comment on the fact that this \$2400 you were getting as salary from the partnership made it \$12,000 salary, or totaled from both organizations, the same that Mr. Shaffer was getting at that time?

A. I wasn't aware of that fact. It had nothing to do with setting it up that way.

Mr. Picco: That is all the questions I have.

The Court: Do the stipulations of fact show the financial worth of the individual partners? I don't know whether that is material or not.

Mr. Perkins: It shows the amount the individual partners withdrew from the partnership.

The Court: I know, but their financial worth, I don't know whether that might become involved.

Mr. Perkins: I don't think there is anything to [41] indicate the financial worth of the partners, of the stockholders individually.

Mr. Picco: The stipulation indicates that two

(Testimony of Samuel B. Stocking.)

of the partners had to borrow money to contribute the capital.

The Court: I don't know whether that might become involved or not.

Mr. Picco: On the other hand, the stipulation does contain the balance sheets in two or three instances at the end of the year, for the Shaffer Terminals, and also the cash position at the time of the transfer of the personal property.

The Court: Any further questions of this witness?

Mr. Perkins: No, I have none.

(Witness excused.)

Mr. Perkins: That is all the testimony I have. There is just one question I want to take up with Mr. Picco. On page 5 of the stipulation there is a slight misunderstanding.

Paragraph 9, we state that the Petitioner secured authority from the War Production Board for the purpose—for the purchase of needed equipment, because it could secure such authority.

The Petitioner in three cases ordered the equipment and sent a check with the order, and before these checks [42] were returned to Tacoma for payment, the partnership gave the Petitioner a check for the exact amount. The pertinent amounts and dates are as follows. I have the date of the Petitioner's check. Then I have a column for amount. Date paid. That is the date Petitioner's check came to the bank. Then date of Equipment

Associates check. In two instances, the check of Equipment Associates came before the other, so none of the Petitioner's money was actually used.

In the third case, Petitioner's check was paid June 27, July 30 the partnership reimbursed Petitioner. Now there is a slight misunderstanding in the amount of the check, I have there in the stipulation which I prepared. The amount of the check to Equipment Associates to Shaffer includes freight and everything. I don't know if that is material, but I just didn't want any misunderstandings. Perhaps it would have been better if the column of amount had come after Equipment Associates check, but it is the amount of Equipment Associates check and not the amount of Shaffer Terminals.

The Court: The Respondents so agree?

Mr. Picco: Yes.

The Court: That will be used in interpreting that portion of the stipulation of facts.

Mr. Perkins: I understand that it is customary to submit written briefs some time in the future?

The Court: Yes. [43]

The Court: Yes.

Mr. Perkins: I have just ordered a transcript of the evidence for deferred delivery. It apparently comes from Washington, D. C. The other stipulation which we agreed to this morning for a deposition which will be taken, I hope, the week of the 17th.

Mr. Picco has mentioned to me that he may need a little more time than customary. I will give him

all he wants. I would like the same consideration. Do you want to fix the time?

The Court: Yes. Do counsel agree on what time they prefer? Will sixty days be all right?

Mr. Perkins: Surely.

The Court: September the 5th. Both parties are given until September the 5th, within which to file their original brief, and if they desire to file a reply brief, either of them may have twenty or thirty days. Thirty, I think, is probably preferable.

Mr. Perkins: We file our briefs together, at the same time?

The Court: You file them contemporaneously. September the 5th. That is the alternate system of filing. This is the concurrent system that we are using now.

Mr. Perkins: How many days for a reply, Your Honor? [44]

The Court: Thirty days. October the 5th. And either party will have until October 5th within which to file reply briefs, should they elect so to do.

Mr. Perkins: The filing date they have to be in Washington, D. C.?

The Court: That is my understanding. They have to be there by that time.

Mr. Picco: I think some time ought to be set for the record, as I understand the testimony by deposition will be entered——

The Court: Is the deposition to be taken?

Mr. Perkins: To be taken during the week of the 17th.

The Court: Better get the name of the witness, for the record.

Mr. Perkins: E. E. Sears.

The Court: The oral deposition of E. E. Sears is to be taken by the parties, not later than August what?

Mr. Perkins: I was told, he told me that he would be back in his office July 17th. There is no reason why it can't be done that week, if I can arrange with you.

The Court: The deposition will be taken and it will be filed as part of the record in this case, and it will be considered by the Court as part of the evidence in the case. [45]

Mr. Perkins: Yes.

Mr. Picco: Thank you, Your Honor.

(Whereupon, at 3:10 o'clock p.m., July 5, 1950, the hearing concluded.)

Filed T. C. U. S., August 10, 1950. [46]

[Title of Tax Court and Cause.]

STIPULATION TO TAKE DEPOSITION

Whereas, the above-entitled proceeding came on for hearing before a Division of the Tax Court of the United States, sitting at Court Room, United States Court House, Seattle, Washington, on July 5, 1950; and

Whereas, at said time and place the parties hereto, by their respective attorneys, filed with the

Court a partial stipulation of facts in said proceeding, and two witnesses appeared and testified on behalf of the petitioner; and

Whereas, it was, at said time and place, agreed by and between the parties hereto, with the consent and approval of the Court, that this proceeding should be considered as being held open for the purpose of taking the testimony, by deposition, on behalf of the petitioner, of one Eldon E. Searles, at a time and place convenient to said witness and to the parties hereto, but on or before July 31, 1950;

Now, Therefore, It Is Hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the testimony of said witness, Eldon E. Searles, on behalf of petitioner, may be so taken, by deposition, on the 28th day of July, 1950, at the hour of 3:00 p.m. (D. S. T.), before a competent officer, who has no office connection or business employment with either of the parties to this proceeding, to be agreed upon between counsel for the parties to this proceeding prior to the time of the taking of said testimony by deposition, in the City of Tacoma, State of Washington, at Room 1410 Puget Sound Bank Building, 1119 Pacific Avenue, in said city.

/s/ HENRY C. PERKINS,
Attorney for Petitioner.

/s/ CHARLES OLIPHANT, JHP.
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Dated: July 28, 1950.

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for the parties hereto that the deposition of Eldon E. Searles, whose address is 3711 North Proctor, Tacoma, Washington, shall be taken at 3:00 o'clock p.m. on Friday, July 28, 1950, at the Directors' Room of the Puget Sound National Bank of Tacoma, Puget Sound Bank Building, Tacoma 2, Washington, before Russell N. Anderson, whose address is 3202 North 19th Street, Tacoma, Washington, a Notary Public.

Dated this 28th day of July, 1950.

/s/ HENRY C. PERKINS,
Attorney for Petitioner.

/s/ CHARLES OLIPHANT, JHP,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Title of Tax Court and Cause.]

DEPOSITION OF ELDON E. SEARLES

To the Tax Court of the United States:

I, Russell N. Anderson, the person named in the foregoing stipulation to take deposition, hereby certify:

1. That I proceeded, on the 28th day of July, A.D. 1950, at the Directors' Room of the Puget

(Deposition of Eldon E. Searles.)

Sound National Bank of Tacoma, Puget Sound Bank Building, in the City of Tacoma, State of Washington, at 3:00 o'clock p.m., under the said Stipulation and in the presence of Henry C. Perkins and John D. Picco, the counsel for the respective parties, to take the following deposition, viz.:

Eldon E. Searles, a witness produced on behalf of the Petitioner.

2. That said witness was examined under oath at such time and place, and that the testimony of the witness was taken stenographically and reduced to typewriting by me or under my direction.

3. That after the testimony of the witness had been reduced to writing the transcript of the testimony was read and signed by the witness in my presence, and that the witness acknowledged before me that his testimony was in all respects truly and correctly transcribed.

4. That after the signing of the deposition in my presence, no alterations or changes were made therein.

5. That I have no office connection or [1*] business employment with the petitioner or his attorney.

/s/ RUSSELL N. ANDERSON,
Notary Public in and for the State of Washington,
Residing at Tacoma. [2]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Eldon E. Searles.)

ELDON E. SEARLES

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Perkins:

Q. Your name is Eldon E. Searles?

A. That is correct.

Q. You are a vice-president of the Puget Sound National Bank of Tacoma? A. Yes, sir.

Q. Did you hold that office in '42 and '43?

A. I did.

Q. How long have you held that office?

A. Since 1933.

Q. How long have you been engaged in banking?

A. Since 1907.

Q. In what branch of banking have you spent all or most of your time?

A. Most of the time in commercial loans.

Q. Commercial loans. During the 1940's, did you handle financing for Shaffer Terminals?

A. I did.

Q. And also for Equipment Associates?

A. I did. [3]

Q. You are familiar then with the loans that were made to the Shaffer Terminals?

A. I am.

Q. Will you just describe briefly the type of loans they were?

(Deposition of Eldon E. Searles.)

A. The Shaffer Terminals at that time and shortly prior thereto borrowed from us against the cash value of life insurance policies that they had, and occasionally a very short term 30-day or 60-day loan, supposedly against—you might say accounts receivable, or accounts receivable coming in.

Q. That was the only type, was principally a loan against accounts receivable and in some cases backed up by some life insurance.

A. That's right.

Q. Whose was that, do you know?

A. As I recall, it was on the life of both Mr. Kennell and Mr. Stocking.

Q. Now, are you familiar with the loans that were made to Equipment Associates, the partnership? A. Yes.

Q. Am I right that there was a loan made to the partners, individually, for the purpose of contribution to the partnership?

A. That's right. [4]

Q. Then was there a second loan to the partnership, secured by a chattel mortgage?

A. At a later date.

Q. Yes, at a later date. That was the third one, wasn't it?

A. Yes, as I recall there were two chattel mortgages.

Q. Now, are you familiar with the type of property that was acquired?

A. Well, they called them lift trucks, or cleat trucks, or something.

(Deposition of Eldon E. Searles.)

Q. I see. Considering the loans that were made to the partnership for equipment, what qualifications would a corporation have to acquire to qualify for that type of loan at your bank?

A. For equipment?

Q. Yes, for equipment, at the time it was actually acquired by the partnership.

A. Well, there are a number of factors enter into a deal like that. It depends on what sort of record the corporation has had——

Q. Yes.

A. ——and whether or not they are making profits, just so the profits are enough probably to service the loan properly.

Q. Yes.

A. And also take care of their other [5] borrowings.

Q. And further than that, their ability to repay the loan?

A. Oh, yes.

Q. Did Shaffer Terminals, the corporation, have those qualifications during the spring and summer of 1943?

A. Oh, I would say not to buy very much and on a certain element of time basis.

Q. On a certain element of time basis. What do you mean by “time basis”?

A. Well, a year, or a year and a half, or two years?

Q. Did Sam Stocking or Kem Kennell, representing Shaffer Terminals, discuss with you the

(Deposition of Eldon E. Searles.)

method of financing equipment which they needed at Shaffer Terminals?

A. Well, they talked in a sort of informal way they were going to need some of this equipment, or thought they ought to buy some because they were renting from the government——

Q. Yes.

A. ——and the danger of having that cut off, and discussed it in an informal way that they ought to buy some——

Q. Yes.

A. ——and discouraged them so far as their buying, and wanted to work it out some other way.

Q. Now, you discouraged the borrowing by the corporation.

A. Yes. Well, I don't know that we just turned them down, but we certainly weren't favorable to it. [6]

Q. Well, no actual application ever came to change that——

A. Not to my knowledge.

Q. Now, will you explain the financial picture of Shaffer Terminals during the spring and summer of 1943?

A. Well, we have a statement from them in the files here, in the early part of '43 I think it was. That was after the war was under way in '43—the early part of '43, and as usual, they only gave us a balance sheet. They never gave me the profit and loss operating figures. They never did except just in a rough way, but they never gave me anything but a balance sheet, and I see one here May 31,

(Deposition of Eldon E. Searles.)

1943. What date we got it I don't know. It was probably shortly afterwards, and that was just a balance sheet.

Q. Yes.

A. Now, in setting up the balance sheet they did as they always have done, they never added in their income tax statement—I mean income tax liability, and I see they didn't here. In fact, Mr. Ogden—I can recognize his little memo down here at the bottom, it says subject to deduction about twenty-five thousand income tax not yet paid for in 1942. I mean, whether that was right, that was his memo.

Q. Yes.

A. That is all I have to go on; so when you add the income tax liability, in our opinion, their current picture is [7] entirely too thin. I believe you would call it, for a borrowing on a time basis.

Q. Are you familiar with the financial history of the company back of '43?

A. Well, yes, we had loans back of '43, and then in the '30s, some, and they would occasionally borrow on these little life insurance policies, five thousand, and occasionally they would borrow something else for 30 days or so, on some particular bunch of business that they had, what we call short term 30-day, 60-day renewals, but the company never had a very good record, and we naturally just dodged anything we could, to a certain extent at least, because we would just be getting a little involved with them if we went too far, we felt, so

(Deposition of Eldon E. Searles.)

we watched it carefully. They were inclined to be a little more optimistic in their opinion than we thought they ought to be on the future, and their earnings were never very good. I see here in my record that they didn't give us a statement between December of '38 and September of '41, for instance. In December of '38 they had a net worth after taking the debts off of about eleven thousand, something, and they owed fifteen thousand six fifty-six fifty-five; and fifteen thousand nine ninety-six to pay it with.

Q. At that time did the income tax and further excess profits tax situation affect you? [8]

A. No, not at that time. Then three years later we got this report—a little better improvement, but still the very thin working capital position that it always had.

Now, maybe I should mention this. Mr. Shaffer, you will remember, was an officer of the bank, and a very fine fellow but an exceedingly optimistic sort of an individual, and always effervescing over a thing, and it made it a little difficult for us to handle the situation and not hurt his feelings because we thought a lot of him, but at the same time we had to always be careful about any commitment we made. Now, that was during up to, I will say, 1940 or '41, along in there—I don't know what time, but that was the general attitude. We had to be careful because they hadn't had a very good showing.

Q. May I ask a question? I don't know as you

(Deposition of Eldon E. Searles.)

understood it. When you were considering in 1943 a loan to a corporation does the income tax bracket that the corporation was in at that time affect you?

A. Well, I will say it does.

Q. Well, I thought you misunderstood me.

A. Oh, I will say it does. For instance, prior to 1943 year, I think this comment about income tax due here, Mr. Ogden made a memo there, and our own officers' comments here refer time and again to the fact that the statements never included that, and we always have to give consideration [9] if there is forty thousand or fifty-five thousand, and so forth.

Q. Did you know what tax bracket they were in at that time?

A. Yes, we knew that they were high. They would have to be. They had such a low—a small investment base. That was one of the very bad features.

Q. Yes. Now, did the possibility that the corporation might be subject to renegotiation affect you in loaning to the corporation in '43—for that period?

A. I couldn't say positively that that did at that time, because we always with all companies of that character had that in mind and discussed it time and again about the negotiations. We were always afraid of renegotiation. Now, no doubt we considered that factor, but later.

Q. Would you in 1943 at the time you loaned the partners of Equipment Associates and Equip-

(Deposition of Eldon E. Searles.)

ment Associates' partnership, have loaned the same amount for the same purpose and same business of the Shaffer Terminals, had they requested it?

A. Now, we didn't loan Equipment Associates then.

Q. I said to the partners. A. Oh.

Q. In other words, those loans that you made to the partners of Equipment Associates and loans to the partnership, would you have made those loans for the same purpose and on the same business to Shaffer Terminals had they [10] requested it?

A. No, I don't think we would because they were not entitled to it. They were borrowing all on these—against government accounts and so forth and the war may be over at any time.

Q. Did I understand you to say that the loans you were making to the Shaffer Terminals were perhaps stretching a point?

A. Well, definitely more than any stretching.

Q. In other words, they were overextended already. A. They were, I knew that.

Q. Now, the loans made to the partners and to the partnership were secured to some extent?

A. Yes. Mr. Shaffer's—we loaned Mr. Shaffer twenty-five hundred, secured by government bonds.

Q. How about Mr. Kennell?

A. Mr. Kennell's was based on his statement. We have his statement here. Mr. Kennell's was on the strength of his own statement and the con-

(Deposition of Eldon E. Searles.)

fidence we had in him, of course, over a period of years that we dealt with him.

Q. Did he have a personal net worth of some sort?

A. He had a personal net worth here of only about nine thousand, but twenty-seven hundred and seventy of it was in cash value life insurance which he was going to put up, but Mr. Kennell was divorced at the time; he had a [11] couple of youngsters that were juniors. It involved changing the beneficiary because they couldn't sign with him, so I agreed with him if he would—we would loan him—he only borrowed twenty-one hundred; he had enough cash to take care of the rest—if he could not pay back the loan over a short period of time satisfactorily that he would assign his life insurance.

Mr. Stocking's loan was twenty-five hundred and was based on his own statement which he gave us at that time, October, eighteen thousand nine hundred and thirty net worth, owing some on his home and some on Shaffer Terminals, and his was based just on his own—on his salary, and we felt on the basis of salary he was entitled to a loan.

Q. I believe you said you discussed informally with Mr. Stocking the method of financing the acquisition of this equipment.

A. I don't know as I said "the method," no. He told us that he wanted to—that they were going to buy—that they ought to buy them to play safe. and as a matter of how to finance——

Q. How to finance? A. Yes.

(Deposition of Eldon E. Searles.)

Q. Did you suggest a method that they finance it on?

A. I couldn't say that I suggested that they buy it personally. [12] I don't remember that I said anything about him borrowing personally, but I certainly discouraged them from borrowing for the company, because the company did not—we felt should not go into any deal to buy equipment.

Q. To just make it definite, in your opinion Shaffer Terminals couldn't have qualified at that time?

A. Not properly according to our policy, no.

Mr. Perkins: That is all.

Cross-Examination

By Mr. Picco:

Q. Now, Mr. Searles, what was your official position at the bank in September and October of 1943, at the time these discussions with Mr. Stocking and Mr. Kennell? A. Vice-president.

Q. Did you also talk with Mr. Shaffer at that time?

A. I don't recall ever talking with him, other than the fact that when he wanted to borrow this, Mr. Shaffer was very careful about mixing in his affairs—his own affairs. Further than that, Mr. Shaffer was ill at the time at home or probably in the hospital. He died shortly after that.

Q. You didn't discuss anything with Mr. Hopkins? A. No, never.

(Deposition of Eldon E. Searles.)

Q. Did you do business with these people in your official [13] capacity as a representative of the bank? A. I did.

Q. You didn't necessarily do it as a friend?

A. No.

Q. Well, tell me, did Shaffer Terminals request a loan of \$9500.00 in September and October of 1943?

A. Not that I know of. Not formally. A lot of those things we discuss informally. It is done time and again.

Q. In other words, at that time you had no application for a loan from Shaffer Terminals?

A. We had no application, I am sure. The file doesn't reveal that we had an actual application.

Q. Did you advise Mr. Stocking and Mr. Kennell to form a partnership at that time?

A. I did not.

Q. You did recommend a loan at that time to Mr. Stocking and Mr. Kennell?

A. And Mr. Shaffer.

Q. And Mr. Shaffer, a twenty-five hundred dollar loan? A. They asked for it.

Q. That's right, and you recommended the loan?

A. Sure. I made the loans.

Q. As a matter of fact, you did not say then nor do you say now, that you would refuse to recommend a loan of nearly \$9500.00 to Shaffer Terminals in September and October, [14] 1943?

A. I would not have recommended it. It might

(Deposition of Eldon E. Searles.)

have gone through but I wouldn't have recommended it.

Q. You were aware, were you not, that the \$2500.00 loans to the individuals—that is, Mr. Stocking and Mr. Kennell—were for the purpose of financing the purchase of this equipment which would be used by Shaffer Terminals?

A. They were forming a partnership and they wanted that much to go in. Now, what they were buying exactly at that time I don't recall. I think probably the files probably tells us—it probably mentions it. I'd have to look and see.

Q. I assume you people definitely want to know what the loan is going to be used for, don't you?

A. Oh, yes, of course. Yes, here is Mr. Stocking's statement, account of the interest in partnership of Equipment Associates. Mr. Stocking and Mr. Shaffer and Mr. Kennell, to form a partnership; style of business is associates, and each of which is to own a one-fourth interest, and they are putting up \$2500.00 each, or a total of \$2500.00, and then below is the new loan of \$2500.00. We granted Mr. Stocking an unsecured loan of \$2500.00 for 90 days at five per cent. The purpose of this loan is to furnish funds required of Mr. Stocking to purchase this one twenty-five per cent interest.

Q. The question was: did you know what the purpose of this [15] loan was? Was the loan for the purpose of purchasing this equipment that would be used by Shaffer Terminals?

A. Well, that does not say anything about it.

(Deposition of Eldon E. Searles.)

He is buying a twenty-five per cent interest. Now, I will see what Mr. Kennell says, and see what he says about it.

Q. Don't necessarily read from that, if you please. Just read it over and find out what it is and then tell us, if you please.

A. It does not refer to the purpose of the funds at all. It's buying a twenty-five per cent interest.

Q. Is it not a fact that you would have known what was the purpose of the loan, would you not?

A. Probably would have.

Q. So would you say that you did know the purpose of the loan at that time?

A. I imagine I did but I can't say I did, because I don't know I did, but I imagine that is what it was for.

Q. Now, if that is what it was for, you people wouldn't have been interested in knowing what the individuals were going to do about how to get this money into the corporation that you—you wouldn't care whether they formed a partnership and bought the equipment themselves, or whether they directly loaned that money to the corporation? That wasn't any of your affair, as long as they were using it for the purchase of the equipment? [16]

A. I certainly would want to know what they are using it for, I mean, that they were making money out of it.

Q. That's right.

A. They were going to form this Equipment

(Deposition of Eldon E. Searles.)

Associates partnership here and supposed to make some money on it, to pay the loan back.

Q. That is correct. You knew, however, that they were to use this money to purchase this equipment?

A. I didn't say I knew they were going to buy equipment. The file doesn't say that we knew they were going to buy equipment.

Q. If the file doesn't say it, at least you did know what they wanted that money for?

A. I assumed that——

Q. So we know what they use that money for?

A. ——because we expected they would get enough money back, enough to pay the equipment loan off.

Q. All my question is, as far as you are concerned, you wouldn't have cared whether they loaned that money directly to the corporation, or whether they formed a partnership to loan it to the corporation? A. Yes, I would.

Q. Why would you?

A. Because I would want to know how that money is coming back, and that corporation was in no condition to pay [17] money back from profits.

Q. Well, do you realize that that partnership was dependent completely on Shaffer Terminals for whatever money it was going to get in this deal?

A. Well, from a lease standpoint I suppose they were.

Q. Then you had to get interested in knowing just exactly what Shaffer Terminals was going to

(Deposition of Eldon E. Searles.)

do about this thing, or at least you had to feel certain that they would be able to get this money from Shaffer Terminals in order to repay your loan?

A. Well, no, the payment of that loan from those individuals was based upon their personal responsibility. We wouldn't have loaned it otherwise than that way.

Q. Now, you stated that you did loan money to Shaffer Terminals before that time? A. Yes.

Q. Can you tell us just how much money you loaned the Shaffer Terminals before that time?

A. Well, how much? Do you mean in what way, the peak loan, probably?

Q. Just go over your records and tell us the few times that Shaffer Terminals borrowed money, how much money was borrowed and what the terms were. A. Prior to that time?

Q. Prior to that time. As I understand it now, they did not [18] apply for a loan at this particular time in September and October of 1943?

A. Informally they talked about wanting to buy some equipment.

Q. That is the two officers, Stocking and Kennell?

A. Stocking and Kennell. Well, they had a loan back here in February of ten thousand, and advised that they needed some payments then pending from the government——

Q. Well, what time—— A. April.

Q. April of what year? A. '43.

(Deposition of Eldon E. Searles.)

Q. '43, and what were the terms on that?

A. It doesn't say—30 days, it says, 30-day note.

Q. Was that note paid up in the 30 days?

A. Let me see. It doesn't mention renewal. We don't write in every item here, but they borrowed an additional five thousand further on in April.

Q. Of 1943? A. Uh-huh.

Q. And was that a one-month note, too?

A. It doesn't say—30 days.

Q. Did they pay that up?

A. No, and so as they did not pay it promptly, and we had to renew it again. Note renewed, I renewed the note again.

Q. Was it paid then? [19]

A. No, in June a loan to enable them to carry the government receivables. It reduced their loan to ten thousand. In other words, it was up and down in there.

Q. You were, again in 1943, loaning Shaffer Terminals money on those accounts?

A. Well, we loaned them on the accounts receivable just because they had it coming.

Q. That is what you were doing it on?

A. Yes, sir.

Q. Did they borrow any money in 1942?

A. Yes, a life insurance loan—against the life insurance, rather. And they borrowed five thousand in April of '42.

Q. What kind of terms did you give them?

A. It doesn't say here. It doesn't show. We didn't always put that down.

(Deposition of Eldon E. Searles.)

Q. I take it that these loans were paid. Otherwise you would have that on there? A. Yes.

Q. Were there any other loans in 1942?

A. Yes, twenty-five hundred more along in July. It was drawn for 30 days.

Q. Look through 1942 and see how many loans you did have, giving the amounts and the terms.

A. Well, you have to understand that this type of a record doesn't always show every five thousand or twenty-five [20] hundred dollar loan is made or paid, and here is a loan made in July of five thousand for 30 days, assisting in carrying heavy receivables, and along in October——

Q. How much was that loan?

A. Five thousand.

Q. That was in '42? A. Uh-huh.

Q. And the terms? A. 30 days.

Q. All right.

A. Here is another in October of five thousand which was paid in December.

Q. Are those all the loans you can find?

A. Yes, that is all, yes.

Q. How about 1941? Did you make any loans in 1941?

A. I possibly did. Now in July I see a \$2000.00 loan against the life insurance.

Q. Did they pay that up? What was the terms on that one?

A. Oh, we always draw it for one year and they can pay it any time they want to.

(Deposition of Eldon E. Searles.)

Q. When did they pay it up, can you tell by looking at that? A. Not necessarily, no.

Q. That loan against insurance you can cash in on that? A. Cash value. [21]

Q. Usually loans against accounts receivable and other securities you make it for one month, or maybe a smaller term?

A. Sixty or ninety days. In October of '41 we handled a five thousand dollar loan on a 30-day basis, while they expected to retire it prior to that time. Whether they did or not I don't know.

Q. Well, from your recollection they made these payments, did they not? A. Yes.

Q. Now, in view of the fact that your bank did make these loans from 1941 on, to Shaffer Terminal, anywhere from two thousand up to ten thousand dollars on terms of one month, would you maintain your statement that you would not have recommended a loan in September and October of 1943, for \$9500.00?

A. Yes, on a term basis, yes.

Q. Well, what do you mean by a "term basis"?

A. Oh, eighteen months or two years.

Q. Well, you were not sure whether they would last for eighteen months or two years, were you?

A. Well, I don't know, but normally that is about what they generally run.

Q. In other words, when you made the statement that you would not recommend the loan to Shaffer Terminals, you meant [22] a loan on a basis of repayment within eighteen months or two years?

(Deposition of Eldon E. Searles.)

A. Oh, no, I believe it could be 12 months.

Q. That is right.

However, as far as these three months' loans are concerned, would you change your mind as to whether you would recommend a loan to Shaffer Terminals in September and October of 1943?

A. For these type of loans?

Q. That is right.

A. No, we made them but we didn't like to make them, I will be frank with you on that.

Q. Your answer is that you would recommend, then? A. Well, under the circumstances, yes.

Q. Now, the type of terms you gave to Mr. Kennell and Mr. Stocking were small term loans, were they not, of three months?

A. Oh, well, we never expect them to pay it back in three months.

Q. Well, I mean that they were?

A. Well, that is the way we draw them.

Q. You draw them for three months.

A. Yes, that is correct.

Q. So when you said you discouraged borrowing by Shaffer Terminals when you were discussing this matter with [23] Mr. Stocking, you meant borrowing on a basis of eighteen months or one year?

A. That is right.

Q. And when you said Shaffer Terminals was not qualified to borrow, say \$9500.00 in September of 1943, you meant borrowing upon a long term?

A. That would be my opinion on it, that is correct.

(Deposition of Eldon E. Searles.)

Q. Do I understand, to repeat again, as far as borrowing—as far as this partnership is concerned, you gave no advice one way or another on that, you weren't interested in that, whether they operated the business by the partnership or by any other form of structure. You were interested in the security of the loan and how they would pay it back?

A. That is the personal—you are speaking of personal loans, that is right.

Q. Now, did you deal exclusively with Mr.—you dealt exclusively with Mr. Stocking and Mr. Kennell and Mr. Shaffer on these partnership loans?

A. That is right.

Q. Who was the most active member of Shaffer Terminals at that time? That is, if you know.

A. Oh, I don't know whether Mr. Stocking or Mr. Kennell was. Mr. Shaffer, of course, was ill.

Q. Was he ill at that time? [24]

A. Yes, he died shortly afterwards.

Q. Do you know whether he had been active at one time? A. Oh, yes, very.

Q. Would you say he was active at all of 1943?

A. No, just in a supervisory way—or in an advisory capacity.

Q. If you know, when was it that his health began to affect his activity with Shaffer Terminals?

A. He came in the bank about 1937, I guess. Of course, he gave up most of his time to that from '37 on for six years, there, but he was always in touch with the affairs of the company, I think, pretty well.

(Deposition of Eldon E. Searles.)

Q. Now, you did know, I take it then, the financial position of Shaffer Terminals at all times during the war years, and especially in September and October of 1943?

A. They gave us a statement periodically, such as it was, a balance sheet. No profit and loss statement.

Q. Of course, you could have gotten a profit and loss statement if you had asked for it?

A. No, they never wanted to give it—I mean, we never insisted on it.

Q. You never insisted on it?

A. We never insisted on it.

Q. I want you to look at Exhibit 5 which is an exhibit which we have attached to a stipulation of facts in this case. That is an agreed statement as to the working capital [25] position. The second column tells you what their working capital position was in September and October you might say—it is dated September 30, 1943. The bank balance at that time was over \$28,000, as you can see, and their accounts receivable, as you know, were accounts owing by the government and by——

A. That is right.

Q. Is over \$134,000.00. They had some notes payable and some accounts payable, but they are approximately \$72,000.00. Now, with that in mind, and in view of what you do know about this corporation all throughout there, you wouldn't say they were bankrupt at that time at all?

A. No, they were not, but there was another lia-

(Deposition of Eldon E. Searles.)

bility in there during the war years, believe me, we watched closely, and that is your tax liability. It doesn't show there.

Q. That is correct.

A. And we never knew what it was or exactly how much it was. We had no way of determining exactly, only just by their verbal statement.

Q. Of course, you understand on a short term loan of one month or three——

A. That's right——

Q. You weren't interested in their tax load at the end of the year?

A. That is the reason we make those loans. [26]

Q. From that working capital position you wouldn't say at that time that they were in any financial difficulties, would you? That is, Shaffer Terminals.

A. No, I wouldn't say they were in difficulties, but you add your tax liability on there which we certainly always do. They found it to be a very real liability in a lot of cases when they finally woke up.

Q. Did you know what the liability was in that corporation?

A. They told me exactly what it was. I think I have got some comment on that. That's the end of their fiscal year.

Q. From the standpoint of short term loans, however, would you say that they were in any financial difficulties, I mean, from the standpoint of what you are looking at?

(Deposition of Eldon E. Searles.)

A. Well, no, I wouldn't say they were in any difficulties, but we never looked upon it with a great deal of favor, I'll say that. I have got comments in here that refer to that.

Q. But you are satisfied that their cash position was as stated there to be, and the accounts receivable were over \$134,000.00?

A. If we didn't have confidence in those individuals that we did, that they were morally right, we never would have gone this way with them. Just never.

Q. I mean on accounts receivable from these various elements of over \$134,000.00 on that alone, if you didn't have [27] your cash position as strong as it appeared to be, twenty-eight thousand, you were perfectly confident that you would get a hundred per cent back on these government accounts or you wouldn't have made the loan on them?

A. We wouldn't have made the loan, unless we thought they would pay, yes.

Q. I want to ask you one other question here. Say in September and October, 1943, with that Exhibit 5 before you, would you say there was any occasion at all for Shaffer Terminals to borrow \$9500.00?

A. September of '43?

Q. That's right.

A. Well, I don't know what they had to pay out there. They probably had a note coming due for one thing, and another thing is the accounts payable at thirty-seven thousand, and a Social Security Tax for thirteen thousand. That's fifty thou-

(Deposition of Eldon E. Searles.)

sand alone. Twenty-eight thousand, they won't go very far on that.

Q. But you have got twenty-eight thousand dollars in cash. You have got over a hundred and thirty-four thousand in accounts receivable.

A. Yes.

Q. They might have been squeezed for cash at that particular time, so there might have been an occasion for borrowing at that time, as far as Shaffer Terminals is concerned, [28] is that correct?

A. To them, their receivables came awfully slow. I'll say Uncle Sam paid awful slow.

Q. But they did pay every dime as far as I can tell from that, did they not?

A. As far as I know.

Q. Now, assuming that there was a need to borrow this money on this particular date, what difficulties could you have visualized at that time that could have been encountered by Shaffer Terminals as far as getting a loan of \$9500.00 from your bank on the same terms that you gave the individuals, three months?

A. Oh, we wouldn't have loaned it to them for three months. It is foolish to talk about three months. They wouldn't pay it back in three months if it was going to be for equipment. But the individual, you loan an individual entirely on a basis that you don't expect to get it back in three months.

Q. You did loan to these individuals on a three-month basis, did you not?

A. We draw the notes that way.

(Deposition of Eldon E. Searles.)

Q. And you had loaned Shaffer Terminals all throughout the year before and for the last two or three years \$10,000.00 and \$5,000.00, and \$2,000.00 and another \$5,000.00 and a few other loans all on the basis of one month and if they [29] needed a renewal once or twice you gave it to them. Now, on that basis—I think we did cover this ground and I don't want to keep harping on this, but on that basis you would have at that particular time recommended a loan and they probably would have gotten the loan if they had applied?

A. On an equipment basis?

Q. On a short time loan for——

A. I would not recommend it, I know that. Now, that might have happened——

Q. I understood you to mean not too long ago—about five minutes ago that you would have recommended a loan or a short term loan up to \$9500.00.

A. No, certainly not to buy equipment. The equipment isn't going to pay back a loan, but Uncle Sam's \$10,000.00 coming to them would pay back a loan. That comes in as cash. The equipment doesn't come back as cash.

Q. Do you mean to tell me and tell any reasonable person that you wouldn't have loaned \$9500.00 on the face of that working capital position, regardless of what that money was applied for, I mean whether it was applied for equipment or any other normal purpose of the corporation. Your only qualification, would it not, be that it was one

(Deposition of Eldon E. Searles.)

month. You are interested in whether he could pay up in one month or two months, is that correct? [30]

A. No, I wasn't interested whether they could pay up in one month or two months, fully, except on their loans of forty or forty-five thousand dollars they show they are borrowing here. But if they are borrowing to provide equipment, then I'm going to get back a ten thousand dollar check at the end of 30 days for equipment to pay the loan; but if Uncle Sam owes them ten thousand dollars, they must get the check in to pay the other loans.

Q. That's correct.

A. Well, that is two different things.

Q. Well, isn't that—you loan that money to the three individuals on the same property, and you put it on a three-months' basis. Now you say yet you renewed that? A. Sure.

Q. But you didn't have to renew it at the end of three months?

A. We do that with individuals right along. A man making a thousand dollars a month like Stocking was, he is certainly good for a twenty-five hundred dollar loan, and can pay it back over a period of time. It is done all the time with individuals.

Q. Do you know where Stocking was getting his money? A. His salary?

Q. That is his salary from the Terminals. The fact that paying you back on those individual loans was dependent on just how successful they were with the operation of [31] Shaffer Terminals.

A. To a certain extent yes, but he had an

(Deposition of Eldon E. Searles.)

eighteen thousand dollar net worth. He had other sources of funds. He owned part of the Terminal Warehouse for instance, something the Shaffer Terminals had nothing to do with.

Q. So you don't think that any bank would have loaned a mere \$9500.00 to Shaffer Terminals on a three months' note basis?

A. I don't know that.

Q. —in September and October of 1943, in view of that working capital position?

A. I would have to qualify the working capital position, because that is not a working capital position. You have got probably fifty thousand more income tax that is not revealed there.

Q. You just got through telling me that on a short term loan you are not interested in the tax loan which might have to be carried by the applicant for a loan. Do you know, Mr. Searles, that it cost Shaffer Terminals over \$77,000.00 in rental payments during 1943, 1944 and 1945, for using the equipment which cost these particular officers doing business as Equipment Associates, approximately \$30,000.00?

A. No.

Q. I want you to examine Exhibit 3 which is a list of the rentals. Look at the—I think it is the second column, [32] rental paid to Equipment Associates.

You will note there that the corporation was paying out anywheres from eighteen hundred to fifty-five hundred dollars each month, approximately, in 1943 and 1944, for the use of equipment. Would you

(Deposition of Eldon E. Searles.)

say that any corporation which could pay that kind of money out every month was not qualified for a ten thousand dollar loan in October and September of 1943?

A. You are talking about '43 and referring to what happened afterwards. We didn't know what would happen afterwards. I didn't know what was going to happen after '43. We were dealing in '43, when we made our loans.

Q. Sure.

A. Things went along and it worked out apparently all right.

Q. You knew that they would have to pay a rental for that equipment?

A. A rental, sure.

Q. You knew that these individuals, Mr. Stocking, Mr. Shaffer, Mr. Kennell and Mr. Hopkins were depending on rental payments for the solvency of the partnership which they had formed?

A. We weren't depending on that because they had plenty of assets as far as we were concerned to our loans.

Q. But you did know that that was where they were going to get their money, from the rental payments, so far as this [33] business was concerned?

A. I assumed they were, but we weren't worrying about them. They had plenty of assets besides.

Q. I want to ask you another question. Isn't this true that it would have been cheaper for Shaffer Terminals to purchase the equipment itself rather than to pay rentals costing approximately three

(Deposition of Eldon E. Searles.)

times its cost over a period of two and a half years?

A. Well, I suppose. I don't know anything about that part of it.

Q. I mean—I assume you have examined now the rental payments—these rental payments in the second column on Exhibit 3, attached to the stipulation of facts.

To summarize what has been gone over, I just want to ask you a few more questions, Mr. Searles, to see if you have got your testimony correct.

You did not have, in September and October of 1943, any application from Shaffer Terminals for a loan in and around \$9500.00?

A. I am sure we didn't have a formal application, no. The thing was discussed informally about purchasing this equipment, but not in the form of a formal application to put up to the loan committee to pass or reject.

Q. You did not advise Mr. Shaffer, Mr. Stocking, Mr. Kennell or Mr. Hopkins at any time in September or October of 1943 [34] to form a partnership for the purpose of financing the purchase of equipment?

A. I did not.

Q. In fact, as far as the bank was concerned, it wasn't really interested in how that equipment was financed?

A. We were loaning to the individuals at that time, alone.

Q. You said that the Shaffer Terminals had a poor financial record up to 1941?

(Deposition of Eldon E. Searles.)

A. Well, around that period, '40. I don't know just when it first was.

Q. And then it improved after that?

A. It improved some, yes.

Q. It improved to the extent that you did give them a considerable number of loans after '41 and up during the war years, and up to the time—at least up to September of 1943?

A. Yes, and after.

Q. You said after that. Did you make them any loans after that, too?

A. On the same basis on receivables. They would report on what they had coming.

Q. Would you go over your records once more on that on how many loans, the amount of the loans and what the terms were, from September of 1943 on say, through 1945?

A. Well, again I will tell you we don't write down everything. [35]

Q. I appreciate that, but you see what you have in your notes on that.

A. '44, let's see, the unsecured loans in March are mentioned as being twenty thousand, loans against collateral seven thousand. In August we made them a ten thousand dollar loan.

Q. That is August of what year?

A. '44, 30 days.

Q. These loans are short term loans?

A. They were made for 30 days. They didn't always get their money, so they had to renew them

(Deposition of Eldon E. Searles.)

once in a while. They were always based on what they thought they would get in.

September, '44, apparently was a new high, because it is so marked here, a total of forty-five with fifteen thousand more at that time.

Q. In December (sic) of '45?

A. In '44. In September of '44, and then it seems to run along—like they commented here, in October they of course took in payments right along but never received enough to relieve their cash position sufficiently to pay their loans. I mean that is what was happening right then.

Q. Answer my question, please.

A. June of '45—this is a loan being paid in full, twenty thousand. Let's see. They paid a loan reduction in May [36] of twenty-five thousand. They paid another one of twenty thousand in June, so they apparently got some money.

Q. The history shown in your books indicate that the bank was loaning money to Shaffer Terminals you might say frequently, throughout—from 1941 through 1945, is that correct?

A. Yes.

Q. On short term loans?

A. That is right.

Q. Did you say "yes"?

A. Yes.

Mr. Picco: Carry on.

Redirect Examination

By Mr. Perkins:

Q. Do your records show whether or not in September of 1943 you made a loan of \$20,000.00 to Shaffer Terminals—September of '43?

(Deposition of Eldon E. Searles.)

A. Yes, September the 9th, \$20,000.00 loan for 30 days.

Q. Will you take a look at Exhibit 5 which I believe you have before you? A. Yes.

Q. The first date there, the bank balance showing \$115.72, and then the figure just below that of twenty-eight thousand six eight three point [37] three two.

A. That was at the end of that month.

Q. Yes, at the end of that month. Would you say that twenty thousand of that money was the proceeds of the \$20,000.00 loan?

A. Well, that would be hard to say whether it was still in there, but that could be, probably——

Mr. Picco: If you want to answer that question directly—I mean, there is no guessing on that.

The Witness: I have no way of knowing.

Q. Will you look over at the notes payable, line 10, the top figure there is fifteen thousand. Drop down one and it is thirty-five thousand. That does reflect—— A. A twenty thousand loan.

Q. Do you know the purpose of these loans that you made to Shaffer Terminals? In other words, what did they do with the money?

A. Well, it always helped to pay their bills, their labor and things of that nature. It has always been a current deal.

Q. That is called working capital? A. Yes.

Q. In other words the money didn't buy new equipment. It was to pay their current obligations which were largely payroll?

(Deposition of Eldon E. Searles.)

A. Well, what they all were—there was a lot of pay roll, [38] of course.

Q. Well, they had a lot of pay roll then, due to the amount of business. I believe you mentioned that the individual notes executed by the members who later formed a partnership were 30-day notes, were they? A. 90 days, I think.

Q. 90?

A. I believe that is what they state. Normally that would be the way to work them and allow them to pay some and go for another 90 days.

Q. For certain reasons you wanted 90 days, whether it was expected—

A. It always puts you in a good bargaining position.

Q. You said definitely you would not recommend a loan to Shaffer Terminals on a question of credit, but you say it might have gone through. Do loans normally go through against your recommendation?

A. Oh, no, not against recommendation, no. Normally they do not, no.

Q. It would be a very unusual thing if the loan would have gone through?

A. It would be, with the senior officer recommending.

Q. Now when you make a loan, you always consider how that loan is going to be paid back, don't you? A. Sure. [39]

Q. The possibilities of it being paid back. In connection with the loans you made to the indi-

(Deposition of Eldon E. Searles.)

viduals and Equipment Associates, did you consider their source of repayment of the loans?

A. Yes, I did.

Q. What was that source?

A. Well, the individual's source would be their salary, or whatever they have got. Shaffer put up cash—I mean bonds. Kennell agreed to give us a life insurance policy if the loan didn't pay off to our satisfaction and Stocking's own statement of eighteen thousand net worth, justified it.

Q. Now, what was the source of the loan situation of the partnership?

A. Well, by that time they had some strength behind them. As I recall, they came in and said they wanted to buy some more. I don't know whether it was two or three, or whatever the thing was. They came in and had some figures on what they had been doing. We probably wouldn't do it otherwise. No, I wouldn't say we wouldn't do it, otherwise, because if the individual loans had been paid up again, it's a partnership deal.

Q. But my line of thinking it was the experience with the rental payments?

A. That would be the normal thing. We take the history and [40] then say "Well, it looks like it's a good bet here for a little while," and——

Q. If the loan had been made to Shaffer Terminals, and Shaffer bought the equipment, where would there be a source of repayment in that situation?

A. Well, there probably would be a source of re-

(Deposition of Eldon E. Searles.)

payment, as it turned out later, but with the situation—narrow working capital as we showed here.

Q. Was there any apparent possibility of being repaid on a loan like that at that time?

A. Oh, I wouldn't say it was impossible, but gee, with the income tax the way it was and excess profits tax, and that small a base, it was such a small investment. They had no base to operate on. If they made sixty-five thousand dollars, fifty-five thousand would go for tax, or roughly. I don't know the exact figure, but I am just using that as an example.

Recross-Examination

By Mr. Picco:

Q. Now you said that you did look at the source of the income as far as the partners were concerned in their loans which took place in 1944 and in 1945?

A. They had the partnership behind them.

Q. You found at that time that the source was rental payments [41] from Shaffer Terminals?

A. However, the individuals themselves had income, what they had personally.

Q. Now, if Shaffer Terminals would have put in an application—this is an assumption, of course, in March of 1944 and in June of 1945, instead of the partnership, you would have found the same source, would you not, at that time as far as where the money was going to come from?

A. Well, Shaffer Terminals, I don't know—their statements that came in subsequent, I think, did

(Deposition of Eldon E. Searles.)

show an additional strength, as I recall. I don't remember what their statements showed.

Q. You would have found out, would you not, that they were paying rental payments to Equipment Associates anywhere from eighteen hundred up to fifty-five hundred dollars every month?

A. Well, I don't remember——

Q. Well, we are assuming at that time that you did check into that, because you just stated that you knew the source of the income of Equipment Associates.

A. They had it in the record showing that they had done very well. We made them the loans, anyhow.

Q. They had had some experience by this time?

A. Yes, that's right.

Q. The only experience they had had was in turning around [42] and turning the equipment back to Shaffer Terminals, and Shaffer Terminals was using it, is that correct?

A. Oh, I meant they had some income—net income from it.

Q. The income was coming purely and simply from the rental payments they received from Shaffer Terminals?

A. From Equipment Associates, I presume.

Q. That's right, that is the only income they had, isn't that right?

A. Well, I don't know. I don't know what else they had. I never checked it.

(Deposition of Eldon E. Searles.)

Q. So you did know that this income was coming from Shaffer Terminals at all times?

A. To Equipment Associates?

Q. That's right.

A. As far as I knew, their arrangements were with Shaffer. I never inquired who they were renting it to.

Q. You did check up—in making this loan you checked up on just what the purpose of the loan was and where the money was going to come from?

A. That's right.

Q. And you did find out at that time, is that correct?

A. The fact is, I don't remember much about that loan. I made the loan on equipment, and then took a chattel mortgage on it.

Q. Did they submit a financial statement? [43]

A. No, I don't know whether they did or not.

Q. Well, from your way of doing business would you say they submitted a financial statement?

A. Yes.

Q. One other thing, I wonder if you could spend just a little time in checking over the loans to Kennell, Stocking and Shaffer in September and October of 1943, and see if they took more than three months to pay those loans up? You may not have it and you may.

A. I rather doubt it. I don't know. No, Kennell probably paid on some sort of a monthly basis. That doesn't show here at all. The ledger sheet would

(Deposition of Eldon E. Searles.)

show, but this doesn't show it. It doesn't show on Kennell.

Shaffer—I don't mean Shaffer, but Stocking, rather, in April of '44, we renewed two thousand dollars of the balance. I would say from that he paid \$500.00. That refers to the loan we made to him to purchase a one-fourth interest. We made him a little loan later on his own life insurance. They generally pay on a monthly basis, those fellows, but apparently Stocking did not pay for six months. He only repaid \$500.00.

Q. Mr. Searles, I have got just about two general questions and I am pretty certain they will be the last that I will ask you.

I want to get back to a statement. You said [44] that if, and this is just an assumption, apparently, because they didn't make an application in September or October of 1943, that if Shaffer Terminals had come in for a loan at that time, and if you knew the purpose of the loan was to buy this equipment, you would not have recommended the loan?

A. I wouldn't have under the circumstances, no.

Q. If they were willing to give you a one-month note on that would you have changed your opinion on that, if they would have given you a one-month note?

A. They would have had to give us somewhat of an assurance that that could be paid up along with the rest of the loans.

Q. Well, I say if there was assigned over to you accounts receivable in that amount, accounts receiv-

(Deposition of Eldon E. Searles.)

able that you knew were good from the government?

A. But the accounts receivable were affecting the other loans we already made against them for accounts receivable not assigned to us, but we were looking towards that source of payment, because it affected that. We just as well let them have an open account.

Q. You understand that that loan that they asked for was only in the amount of \$9500.00, or would have asked for was only in the amount of \$9500.00?

A. That's right. [45]

Q. Now on top of that if they had thrown in a chattel mortgage which you probably would have asked for, and possibly if necessary you would have wanted guarantees or something from the stockholders which might have been a possibility, would you still hold to your view that you wouldn't have recommended a loan to this corporation in that particular situation?

A. You are assuming that the stockholders ought to all endorse. They never endorsed separate loans.

Q. I am just going to see how far you would go before you would change your mind as to how you would recommend a loan when it came to Shaffer Terminals, in view of the fact that you had been loaning them all the time before that and after, and I understand that you dealt with them——

A. Yeh——

Q. You are saying "yes," aren't you, to these questions I have asked?

A. I dealt with them, yes.

(Deposition of Eldon E. Searles.)

Q. Yes. A. For some time.

Q. What would you have taken then, before you would have recommended a loan knowing that the purpose of the money was—that the purpose of \$9500.00 was to buy equipment, before you would recommend a loan?

A. Well, I would have to have some—probably the individuals [46] endorsed. I don't know whether I would or not, because we know that the Shaffer Terminals wouldn't get to pay it back—I mean we just assumed they couldn't pay it back.

Q. Now then, how could you assume then they could assign over some accounts receivable to you?

A. We were protected on accounts receivable—but then they will pay accounts receivable loans—all the rest of them have paid out; but how are you going to pay \$10,000.00 by equipment?

Q. How would it have been had you been assured that they would have paid anywhere from \$1800.00 up to \$5500.00 every month, instead of paying out payments to anybody else for rent, they would have saved that? If that was thrown in the picture, would that help it?

A. That would help it, but I didn't know anything about that, what you are saying.

Mr. Picco: That is all the questions I have.

/s/ E. E. SEARLES.

Received T.C.U.S. September 19, 1950.

The Tax Court of the United States

Docket No. 26127

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated February 16, 1951.

FINDINGS OF FACT AND OPINION

Petitioner, a corporation, under a "Sale and Lease Agreement," sold equipment to a partnership composed of its sole stockholders and simultaneously leased it back. The agreement gave petitioner exclusive right to lease the equipment and a first option to purchase upon dissolution of the partnership. Held, amounts paid as alleged rentals to the partnership were not deductible under section 23(a)(1)(A) of the Internal Revenue Code.

HENRY C. PERKINS, ESQ.,

For the Petitioner.

JOHN D. PICCO, ESQ.,

For the Respondent.

Respondent has determined deficiencies in excess profits tax for the years 1944 and 1945 in the amounts of \$20,537.77 and \$22,220.52, respectively.

The only issue before us is whether respondent erred in disallowing deductions taken by petitioner in 1944 and 1945 for amounts paid as rent on equip-

ment under certain "Sale and Lease Agreements" entered into with stockholders of petitioner, doing business as Equipment Associates, a partnership.

Findings of Fact

The facts which were stipulated are so found and are incorporated herein by reference.

Petitioner is a corporation, having been organized under the laws of the State of Washington on April 16, 1921. It is engaged in the business of operating warehouse terminals and storage. Its office and principal place of business is in Tacoma, Washington. Petitioner keeps its books and files its returns on the accrual basis. Its returns for the years here involved were filed with the collector of internal revenue for the district of Washington, at Tacoma.

On January 1, 1943, the outstanding capital stock of petitioner was owned by the following persons:

Shareholder	Shares
R. H. Shaffer.....	108
Samuel B. Stocking.....	72
K. M. Kennell.....	12
W. Hopkins	8
<hr/>	
Total.....	200

On October 20, 1943, R. H. Shaffer died. His shares of stock in petitioner were acquired by the surviving shareholders. On December 31, 1943, the capital stock of petitioner was held as follows:

Shareholder	Shares	% of Ownership
Samuel B. Stocking	157	78.5
K. M. Kennell	26	13
W. Hopkins	17	8.5
	<hr/> 200	<hr/> 100

During the period here involved and after the death of R. H. Shaffer, the sole officers of petitioner, who were also its sole stockholders, were as follows:

Samuel B. Stocking, President.

K. M. Kennell, Vice President-Secretary.

W. Hopkins, Treasurer.

The business of petitioner increased very rapidly and continuously from July, 1942, through 1943 and the subsequent war years. This increase was due to war business provided by the United States Army and Navy, the Russian Government and the British Government. It involved the handling of different cargoes, including supplies for the Alcan Highway and Lend-Lease cargo destined for Russia. Petitioner handled these various cargoes on a daily basis, under an arrangement with the named Governments, which was expected to and did continue for the duration of the war.

The use of certain dock equipment and machinery such as Clark-Fork type lift trucks was essential to the proper conduct of petitioner's business. Petitioner had practically no equipment of this type

and was compelled to rent it from the army under a temporary arrangement until such equipment could be acquired by petitioner. Additional equipment was also rented from local stevedoring concerns. Early in 1943, due to the increase in business and the increasing pressure from the army for the return of the rented equipment, it became apparent to the officers of petitioner that additional equipment should be acquired. This equipment was essential war material and could not be acquired except on priority. Petitioner could obtain the priority because of its essential war activities. Petitioner applied for and was granted priority to purchase new equipment in April, 1943.

On September 22, 1943, a partnership was organized by the individuals named above under the style of Equipment Associates (sometimes hereinafter referred to as the partnership). Subsequent to the death of R. H. Shaffer on October 20, 1943, decedent's interest was acquired equally by the surviving partners and the business was conducted as a partnership under the same name. The partnership agreement dated October 8, 1943, evidencing the oral agreement entered into September 22, 1943, provided in part as follows:

2. The purpose and business of said copartnership shall be primarily to furnish certain equipment for the use of Shaffer Terminals, Inc., and used in essential war work. It is understood that the finances of Shaffer Terminals, Inc., are not sufficient to justify the pur-

chase by said Shaffer Terminals, Inc., of said equipment, such as dock tractors, lift trucks, etc. Equipment Associates will purchase such equipment, hold the same for the exclusive use of Shaffer Terminals, Inc., during the duration of the present emergency, and lease said equipment to said Shaffer Terminals, Inc., at a reasonable rate of rental. When not being used by Shaffer Terminals, Inc., said equipment may, with the consent of Shaffer Terminals, Inc., be temporarily leased to others who have use for said equipment in essential war work.

* * *

6. The copartnership is authorized and empowered to purchase from Shaffer Terminals, Inc., such equipment as Shaffer Terminals, Inc., may desire to dispose of at prices to be agreed upon between the copartnership and said Shaffer Terminals, Inc.

The capital invested in Equipment Associates consisted solely of cash furnished in equal amounts by the partners. Each partner contributed \$2,500. The investment made by W. Hopkins was from his personal funds. Investments made by the other partners were in part from personal funds and in part from bank loans.

The affairs of Equipment Associates were managed by Samuel B. Stocking, for which he was paid \$200 per month, and its books of account were kept by E. A. Seaton, for which he was paid \$30 per month, both items being deductions before partners'

distribution of earnings. E. A. Seaton was also the regular bookkeeper for petitioner. Equipment Associates employed no other employees. It used the office of petitioner for which no rent or charge was paid. Petitioner and Equipment Associates kept separate books and records and there was no intermingling of the partnership and corporate funds or records. The partnership owned no other property except the terminal equipment leased to petitioner.

Subsequent to September 22, 1943, and at all times here material, petitioner obtained the necessary priorities and purchased equipment similar to that already described above. The partnership did not apply for priorities. Petitioner made these purchases on September 30, 1943; March 21, 1944, and June 16, 1945. After each purchase, petitioner transferred legal title to the equipment to the partnership, pursuant to certain "Sale and Lease Agreements" executed in October, 1943; in March, 1944, and in June, 1945.

With respect to the first purchase, petitioner ordered the equipment in September, 1943, and received delivery thereof in the same month. Petitioner sent its check dated September 30, 1943, in payment thereof, in the amount of \$9,529.44, which included the freight charges. This check cleared petitioner's bank on October 13, 1943. The partnership paid petitioner by check dated October 11, 1943. With respect to the second purchase, petitioner ordered the equipment and received delivery thereof some time before March 21, 1944. Petitioner sent its check, dated March 21, 1944, in payment

thereof, in the amount of \$10,298.60, which included the freight charges. This check cleared petitioner's bank on April 3, 1944. The partnership paid the petitioner by check dated March 27, 1944. With respect to the third purchase, petitioner ordered the equipment, and received delivery thereof, some time before June 16, 1945. Petitioner sent its check, dated June 16, 1945, in payment thereof, in the amount of \$10,319.61, which included the freight charges. This check cleared petitioner's bank on June 27, 1945. The partnership paid petitioner on July 30, 1945.

The first purchase of equipment by the partnership was paid for out of the original contributions of capital made by the partners. The second and third purchases were financed by separate loans obtained from the Puget Sound National Bank of Tacoma, secured by chattel mortgages. These loans were classified as commercial or short-term, and notes therefor were drawn on terms of 90 days.

All of the sale and lease agreements were substantially similiar in terms to the "Sale and Lease Agreement" executed October 8, 1943, differing only as to date and the amount of the sales value of the equipment. The "Sale and Lease Agreement" executed October 8, 1943, reads in part as follows:

Witnesseth: Shaffer Terminals, Inc., has heretofore purchased certain machinery and equipment described in "Exhibit A," hereto attached and made a part hereof, as if fully set forth in this paragraph.

On September 30, 1943, Shaffer Terminals,

Inc., sold and transferred said equipment to said Equipment Associates for the sum of \$9,529.44, under the following terms and conditions, to wit:

Shaffer Terminals, Inc., reserves the exclusive right to lease said equipment from Equipment Associates during the entire time of the emergency created by the existing war in which the Government of the United States of America is engaged and said Shaffer Terminals, Inc., agrees to pay to Equipment Associates a monthly rental of \$3.00 per hour of use, minimum 200 hours per month, for the use of said equipment and machinery until a different monthly rental is agreed upon by the parties hereto. [Rate reduced to \$2.75 per hour with no minimum on March 1, 1944.]

In the event Equipment Associates shall determine to dispose of any of said equipment, Shaffer Terminals, Inc., is given the first right to purchase said equipment at a price to be agreed upon by the parties hereto * * *.

It is contemplated that further equipment and machinery will be required from time to time by Shaffer Terminals, Inc., and that said equipment will be provided by said copartnership and leased by said Shaffer Terminals, Inc. * * *.

It is understood that the equipment and machinery herein referred to is necessary for the operations of Shaffer Terminals, Inc., in doing

essential war work; that the finances of said Shaffer Terminals, Inc., are not such at this time as to justify the purchase by said Shaffer Terminals, Inc., of said equipment and machinery and that the said partnership, Equipment Associates, has been organized for the purpose, among other things, of providing the necessary finances for Shaffer Terminals, Inc.

Shaffer Terminals, Inc., will at all times keep any and all of said leased property insured against fire, theft, property damage and public liability, such insurance to be payable to the parties as their interests may appear. Shaffer Terminals, Inc., will hold Equipment Associates harmless from any liability on account of any accidents which may happen to said equipment and machinery and all liability to any parties for the use thereof. Shaffer Terminals, Inc., will pay all operating costs and ordinary maintenance and repairs for said equipment and machinery and at the termination of the rental period will return said property to Equipment Associates in as good condition as when received, ordinary wear and tear excepted.

The rentals paid by petitioner to the partnership were in accord with Tacoma Terminal Tariffs filed with the Public Service Commission of the State of Washington in compliance with section 10383 of Remington's Revised Statutes of Washington. The amounts paid were as follows:

1943	\$ 6,892.50
1944	41,134.82
1945	29,434.46
1946	11,782.32
1947	900.00
<hr/>	
Total	\$90,144.10

During the period here involved no dividends were declared by petitioner. Prior to this period the last dividend was in 1942, and the first dividend after this period was in January, 1946, in the amount of \$12,000. Corporate salaries authorized by petitioner under dates of September 1, 1941, and November 1, 1943, and paid to the officers designated below during the period here involved, were as follows:

Officer	Sept. 1, 1941	Nov. 1, 1943
R. H. Shaffer	\$12,000	-----
Samuel B. Stocking	9,600	\$12,750
K. M. Kennell	4,800	9,850
W. Hopkins	4,500	6,000
<hr/>		<hr/>
Total.....	\$30,900	\$28,600

A summary of petitioner's working capital position at the end of the tax years, and on or about the dates when the equipment was acquired, follows:

Date	Cash	Accounts Receivable	Notes Payable	Accounts Payable	Social Security and Income Tax Reserves
8/31/43.....	\$ 115.72	\$120,946.06	\$15,000.00	\$27,399.19	\$23,670.46
9/30/43.....	28,683.33	134,756.42	35,000.00	37,538.50	13,293.22
12/31/43.....	19,297.28	104,345.78	32,000.00	12,317.73	.....
3/21/44.....	30,512.47	51,782.87	27,000.00	9,867.93	43,849.77
12/31/44.....	86,818.60	80,945.50	52,000.00	49,496.67	.....
6/16/45.....	63,129.76	108,473.80	7,000.00	33,168.15	20,178.05

The earned surplus on December 31, 1944, and December 31, 1945, was \$67,303.28 and \$68,922.29, respectively. This earned surplus is made up largely from cash and accounts receivable owing by the Soviet Purchasing Commission, the British Purchasing Commission, and the United States Army, Navy and Department of Agriculture.

Petitioner's cash balance on or about the dates of acquisition of the equipment was adequate to cover checks drawn in payment therefor.

The Puget Sound National Bank had made loans to petitioner during the years from 1930 to 1941 when petitioner's record was not too satisfactory. During the years 1942 to 1945 petitioner's financial statements showed additional strength and the size of the loans was increased. These loans were usually made for short terms upon assignment to the bank of accounts receivable and were primarily used to meet current expenses.

In 1943, due to the pending possibility of petitioner being unable to obtain rental equipment, officers of petitioner began considering the feasibility of purchasing new equipment. Informal discussions were had with E. E. Searles, vice president of the Puget Sound National Bank, concerning the purchase of equipment and the possibility of obtaining a loan for this purpose. No formal loan application was made by petitioner for consideration by the loan committee of the bank.

As pointed out above the initial purchase by the partnership of the equipment leased to petitioner was paid for by means of personal loans made to

the partners by the bank. Subsequent purchases were financed by loans from the bank made upon the basis of chattel mortgages and the increased earnings of the partnership.

The partnership filed income tax returns for the years 1944 to 1946, inclusive, also the period from January 1, 1947, to June 30, 1947, when it was liquidated, in which it reported gross profits, deductions and net profits as follows:

	1944	1945	1946	1/1-6/30/47
Gross Profit	\$41,468.32	\$30,568.07	\$11,725.32	\$ 912.72
*Deductions	7,183.40	8,277.91	5,135.23	1,035.79
	<hr/>	<hr/>	<hr/>	<hr/>
	\$34,284.92	\$22,290.16	\$ 6,590.09	(\$ 123.07)
Distribution				
Stocking	\$11,428.31	\$7,430.05	\$2,196.69	
Kennell	11,428.31	7,430.05	2,196.70	
Hopkins	11,428.30	7,430.06	2,196.70	

* Includes salary for S. B. Stocking of \$2,400.00 per year for 1944, 1945 and \$1,050.00 for 1946.

Of the gross profits realized by the partnership, rentals paid by petitioner accounted for all except \$333.50 in 1944 and \$1,277 in 1945.

The partnership was liquidated and dissolved as of June 30, 1947. On April 23, 1947, it transferred part of the equipment covered by the "Sale and Lease Agreements" back to petitioner for the sum of \$10,613.49, the book value of said equipment, plus sales tax of \$318.40. The remaining equipment was distributed in final liquidation on June 30, 1947, to the individual partners who transferred it to petitioner on October 27, 1947, for a total consideration of \$7,500. The book value, or depreciated value of this equipment was \$7,223.73 on December 31, 1946.

Petitioner's profits were such that it already was in the 90 per cent bracket under the excess profits tax, and no substantial benefit would have resulted from petitioner acquiring the necessary equipment. The stockholders of petitioner organized the partnership, primarily to avoid the excess profits tax and its impact on the earnings of petitioner. It was not organized for the purpose of financing the purchase of equipment which petitioner needed in its business.

Opinion

Johnson, Judge.

The issue for determination is whether amounts paid as "rent" by petitioner to a partnership composed of its sole stockholders under certain "Sale and Lease Agreements" are proper deductions in the computation of excess profits tax during the years 1944 and 1945 under section 23(a)(1)(A)¹ of the Internal Revenue Code.

¹Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or Business Expenses.

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

This issue depends for its determination upon the fundamental question of whether the transaction here involved is a recognizable sale and lease for tax purposes. Considering first the parties to the transaction, we find the lessor partnership composed of the sole stockholders of petitioner, the lessee. Such a situation bears special scrutiny. *Higgins v. Smith*, 308 U. S. 473. The president of petitioner was also manager of the partnership. The office of the partnership was the same as that of petitioner. The partnership paid no rent and hired no employees except petitioner's regular bookkeeper. The establishment of policies for both petitioner and the partnership was the responsibility of the same individuals. These circumstances, we believe, do not lend toward arm's length dealing in a transaction recognizable for tax purposes.

Petitioner asserts that the partnership was formed for the purpose of acquiring the necessary capital with which to purchase the equipment. This, however, does not impress us in view of petitioner's working capital position at the time of the various purchases which was ample to cover checks drawn on its account. Furthermore, the funds with which the partnership purchased the initial equipment were in the main obtained by bank loans to the partners whose source of repayment was the revenue earned by petitioner. It is also to be noted that the subsequent purchases of equipment by the partnership were financed by bank loans made against chattel mortgages and the increased earnings of the partnership which were the rentals paid by peti-

tioner. In actual effect it was the earning power of petitioner which formed the basis for these financial arrangements. And finally, the testimony of E. E. Searles, of the Puget Sound National Bank, although contradictory, is to the effect that petitioner would have been granted a short-term loan had it made application.

The mere fact that these payments, made by the corporation to the partnership, were labeled rent does not, in fact, make them so. They may be dividend distributions or something other than rent. *Ingle Coal Corporation v. Commissioner* (C.A., 7th Cir., 1949), 174 Fed. (2d) 569; *Limericks, Inc., v. Commissioner* (C.A., 5th Cir.), 165 Fed. (2d) 483. Nor does the fact that there may have been a legally enforceable obligation to pay, as between petitioner and the partnership, make such payments deductible as rent or otherwise under section 23(a)(1)(A) of the Internal Revenue Code. *Interstate Transit Lines*, 44 B.T.A. 957; *affd.*, 130 Fed. (2d) 136; *affd.*, 319 U.S. 590; *Deputy v. Du Pont*, 308 U.S. 488

Whether the "Sale and Lease Agreement" which gave rise to the obligation to pay "rent" is such a transaction as is recognizable for tax purposes depends, we think, upon the practical effect of the end result. These various steps were not separate, independent transactions, but integrated parts of a single plan and "in determining tax consequences we must consider the substance rather than the form of the transaction." *Ingle Coal Corporation v. Commissioner*, *supra*.

Petitioner asserts on the authority of Gregory

v. Helvering, 293 U. S. 465, that it is within the right of a taxpayer to decrease the amount of his tax liability by means within the limits of the law. This is no doubt true. However, the principle enunciated in that case, as we understand it, aside from the question of tax avoidance, is whether the transaction under scrutiny is in substance what it purports to be in form.

Here, the partnership, composed of the sole stockholders of petitioner, was formed for the purpose of purchasing from it and holding for its exclusive use the equipment required. When not being used by petitioner, but only with its consent, the equipment could be temporarily leased to others. The partnership owned nothing but the equipment purchased from petitioner and simultaneously leased back to it. Equipment Associates employed only a manager, who was also the president of petitioner, and a part-time bookkeeper regularly employed by petitioner. By these transactions petitioner, in addition to possessing the exclusive right to lease the equipment, had full control over its use as well and by exercising its first option to purchase the equipment also controlled the partnership's disposition of the equipment.

The net effect of the agreement was to strip the partnership of all incidents of ownership, vesting in it only bare legal title while control over the property remained in petitioner. Such a reservation of control contradicts a sale which presupposes that the seller loses not only title but control. *Esperson v. Commissioner* (C.A., 5th Cir.), 49 Fed. (2d) 259;

Shoenberg v. Commisisoner (C.A., 8th Cir.), 77 Fed. (2d) 446. Such command over the property marks petitioner as the real owner for income tax purposes. Commissioner v. Court Holding Co., 324 U. S. 331. As the Supreme Court stated in Higgins v. Smith, *supra*, pp. 477, 478:

* * * The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property.

Nor does it make any difference that such command "may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency." *Griffiths v. Helvering*, 308 U. S. 355.

The artificiality of these transactions is further emphasized when we view the ultimate result. The partnership purchased the required equipment at the initial cost to petitioner of \$30,147.65. From October, 1943, until February, 1947, petitioner paid rent to the partnership in the amount of \$90,144.10. On April 23, 1946, the partnership sold six pieces of this equipment back to petitioner at the depreciated book value of \$10,613.49, plus sales tax of

\$318.40. The remaining pieces of equipment were distributed to the partners upon the dissolution of the partnership on June 30, 1947, and were sold to petitioner on October 27, 1947, for \$7,500. The total sum paid by petitioner to the partnership for the use and subsequent purchase of equipment initially costing \$30,147.65 was \$108,575.99. The "rental" paid by petitioner comprised the total amount of the partnership earnings, except for a small sum received in rent from others than petitioner, from which the distribution of partnership profits was made to the partners. Petitioner paid no dividends in the years 1943 to 1945, inclusive.

Upon close scrutiny, this entire plan is not, in substance, a sale and lease transaction recognizable for tax purposes and we therefore hold that the amounts paid the partnership by petitioner are not deductible as rent under section 23(a)(1)(A) of the Code.

The facts in the instant case present an even stronger case for respondent than those presented in a similar sale and lease transaction considered in *Catherine G. Armston*, 12 T. C. 539. There, a family corporation sold certain construction equipment to its major stockholder, the taxpayer, who in turn leased it back to the corporation, which paid rent for the use of the equipment. This Court held that this did not constitute a recognizable sale creating a valid obligation to pay rent. There the lessor possessed control over the use of the equipment and full right of sale, whereas in the case before us no such right existed.

Skemp v. Commissioner (C.A., 7th Cir., 1948), 168 Fed. (2d) 598; reversing 8 T. C. 415, is distinguishable from the instant case on the facts. There, ownership and control were relinquished by the donor by irrevocably divesting himself of all title and right to the property upon conveying it to an independent trustee over which the donor had no control. On these facts, the Court of Appeals held that a bona fide lease existed.

Petitioner cites Buffalo Meter Co., 10 T. C. 83, and Seminole Flavor Co., 4 T. C. 1215, which are not applicable here. In those cases there was an actual and real separation of economic interests between two independent business entities, not the creation of a subservient agency from which independence and control has been stripped as in the case before us.

Decision will be entered for the respondent.

Served February 16, 1951.

The Tax Court of the United States

Docket No. 26127

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 16, 1951, it is

Ordered and Decided: That there are deficiencies in excess profits tax for the years 1944 and 1945 in the amounts of \$20,537.77 and \$22,220.52, respectively.

Enter:

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered Feb. 19, 1951.

Served Feb. 21, 1951.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Comes now Shaffer Terminals, Inc., Petitioner in the above-entitled cause, and hereby petitions for a

review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States in said cause entered February 19, 1951, pursuant to the Findings of Fact and Opinion of said Tax Court promulgated February 16, 1951.

The nature of the controversy is as follows:

The Commissioner of Internal Revenue determined deficiencies in Petitioner's excess profits taxes for the years 1944 and 1945 in amounts of \$20,-537.77 and \$22,220.52, based solely on the disallowance as deductions of \$36,484.92 and \$24,633.16 paid by Petitioner in those years, respectively, to Equipment Associates, a partnership, for the rental of equipment required and used by Petitioner in the ordinary course of its business. Petitioner claims the rentals so paid as an allowable deduction in the computation of excess profits taxes for the years involved, under Internal Revenue Code, Section 23(a)(1)(A), as being "ordinary and necessary expenses paid . . . during the taxable year in carrying on" its business. The Tax Court affirmed the Commissioner upon the ground that the rental was paid to a partnership composed of Petitioner's stockholders under a Sale and Lease Agreement which did not constitute "a sale and lease transaction recognizable for tax purposes." Petitioner contends that such conclusion is erroneous as a matter of law, even upon the facts as found by the Tax Court, but contends further that the findings of the Tax Court are incomplete and in part clearly erroneous, so that complete and proper findings

necessitate a contrary conclusion as a matter of law.

The review is sought in the United States Circuit Court of Appeals for the Ninth Circuit under Internal Revenue Code, Section 1141, upon the ground and for the reason that the Petitioner's returns of the taxes in respect of which its liability for the contested deficiencies arises were made to the Collector of Internal Revenue for the District of Washington, whose office is located at Tacoma, Washington, within the Ninth Judicial Circuit of the United States.

Dated this 7th day of May, 1951.

SHAFFER TERMINALS, INC.,
Petitioner.

By /s/ SCOTT Z. HENDERSON,
/s/ HENRY C. PERKINS,
Its Attorneys.

FREDERICK D. METZGER,
HENDERSON, CARNAHAN &
THOMPSON,
METZGER, BLAIR, GARDNER
& BOLDT,
Of Counsel.

Received and filed T.C.U.S. May 9, 1951.

[Title of Tax Court and Cause.]

CLERK'S CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers and proceedings before the Tax Court of the United States as set forth in the "Designation of Contents of Record on Review" on file in my office as the original record in the above-entitled proceeding and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of The United States, at Washington, in the District of Columbia, this 6th day of June, 1950.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, the Tax Court of the
United States.

[Endorsed]: No. 12973. United States Court of Appeals for the Ninth Circuit. Shaffer Terminals, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed June 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 12973

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS RELIED ON
BY PETITIONER

Comes now Shaffer Terminals, Inc., petitioner in the above-entitled cause, and makes the following statement of the points on which it intends to rely, namely:

I.

The rentals paid by petitioner to Equipment Associates, a partnership composed of petitioner's stockholders, for equipment needed by petitioner in its business are "trade or business expenses" and proper deductions in the computation of excess profits taxes under Section 23(a)(1)(A) of the Internal Revenue Code.

II.

The organization of the partnership, Equipment Associates, by the stockholders of petitioner was for and accomplished a business purpose. The finding and conclusion of the Tax Court that such organization was "primarily to avoid the excess profits tax" and not "for the purpose of financing equip-

ment which petitioner needed in its business," is clearly erroneous.

III.

The organization of the partnership, Equipment Associates, and the sale and lease agreements made by and between Equipment Associates and the petitioner changed the flow of economic benefits. Accordingly, the Tax Court was in error in dismissing from consideration the transfer of assets effected thereby and holding that the plan was not a "sale and lease transaction recognizable for tax purposes."

IV.

The following findings of the Tax Court were clearly erroneous:

(1) "The funds with which the partnership purchased the initial equipment were in the main obtained by bank loans to the partners, whose source of repayment was the revenue earned by petitioner." (Opinion of Tax Court, Document No. 19 of Record on Review, at page 12.)

(2) "The testimony of E. E. Searles, of the Puget Sound Bank, although contradictory, is to the effect that petitioner would have been granted a short term loan had it made application." (Opinion of Tax Court, Document No. 19 of Record on Review, at page 12.)

(3) "The net effect of the agreement was to strip the partnership of all incidents of ownership . . ." (Opinion of Tax Court, Document No. 19 of Record on Review, at page 14.)

(4) That the transactions between the partnership and petitioner were purely artificial, unreal, and a sham. (Opinion of Tax Court, Document No. 19 of Record on Review, at page 14.)

Dated at Tacoma, Washington, this 19th day of June, 1951.

/s/ HENRY C. PERKINS,

/s/ FREDERICK D. METZGER,
Attorneys for Petitioner.

[Endorsed]: Filed U.S.C.A. June 21, 1951.

No. 12973

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,	}
<i>Petitioner,</i>	
vs.	
COMMISSIONER OF INTERNAL REVENUE,	
<i>Respondent.</i>	}

UPON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

Brief of Petitioner

HENRY C. PERKINS,
FREDERICK D. METZGER,
Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel.

523 Tacoma Building
Tacoma 2, Washington

SUBJECT INDEX

	Pages
INTRODUCTION	3
JURISDICTIONAL STATEMENT	4
STATEMENT OF THE CASE	5
ASSIGNMENTS OF ERROR	10
ARGUMENT	12
The rentals paid are allowable deductions	12
Erroneous findings of the Tax Court	22

TABLE OF CASES

A & A TOOL & SUPPLY CO. v. COMMISSIONER, 182 Fed.(2d) 300, (C.C.A. 10th)	23
W. H. ARMISTON CO. v. COMMISSIONER, 188 Fed.(2d) 531, (C.C.A. 5th)	21
BROWN v. COMMISSIONER, 180 Fed.(2d) 926, (C.C.A. 3rd)	13, 20
COCA COLA BOTTLING CO. OF SACRAMENTO, LTD. v. COMMISSIONER, 17 Tax Court, No. 14, promulgated July 31, 1951	12, 13, 15
COMMISSIONER v. GREENSPUN, 156 Fed.(2d) 917, (C.C.A. 5th)	13, 20
DENNING & CO. v. COMMISSIONER, 180 Fed.(2d) 288, (C.C.A. 10th)	13, 15
GRACE BROS. v. COMMISSIONER, 173 Fed.(2d) 170, (C.C.A. 9th)	23
GREGORY v. HELVERING, 293 U. S. 465, 79 L. Ed. 596	12, 19
HIGGINS v. SMITH, 308 U. S. 437, 84 L. Ed. 406	13, 19, 20
JONES v. HELVERING, 63 App. D.C. 240, 71 Fed.(2d) 214, Cert. denied, 293 U. S. 583, 79 L. Ed. 679	12
MOLINE PROPERTIES, INC. v. COMMISSIONER, 319 U. S. 436, 87 L. Ed. 1499	12, 13, 14, 18
NATIONAL INVESTORS CORP. v. HOEY, 144 Fed.(2d) 466, (C.C.A. 2nd)	13, 14
ROBINSON TRUCK LINES v. COMMISSIONER, 183 Fed.(2d) 739, (C.C.A. 5th)	23
ROSS v. COMMISSIONER, 129 Fed.(2d) 310, (C.C.A. 5th)	20
SHIRLEY v. O'MALLEY, 91 Fed. Supp. 98, (D.C.D. Nebr.)	13, 20
SKEMP v. COMMISSIONER, 168 Fed.(2d) 598 (C.C.A. 7th)	13
TWIN OAKS CO. v. COMMISSIONER, 183 Fed.(2d) 385, (C.C.A. 9th)	12, 13, 16, 20, 22
U. S. v. U. S. GYPSUM CO., 333 U. S. 364, 92 L. Ed. 746	23

STATUTES

INTERNAL REVENUE CODE, Sec. 23(a)(1)(A)	10, 29
Sec. 272	4
Sec. 1101	4
Sec. 1141	4
REMINGTON REVISED STATUTES, Sec. 10383	9

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

INTRODUCTION

As set forth in the Petition for Review (R. 191 to 193), this is a petition to review a decision of the Tax Court of the United States affirming the determination by the Commissioner of Internal Revenue of deficiencies in Petitioner's excess profits taxes for the years 1944 and 1945, which determination was based solely on the disallowance as deductions of amounts paid by the Petitioner in those years for the rental of equipment required and used by it in the ordinary course of its business.

JURISDICTIONAL STATEMENT

Under date of September 23, 1949, the Commissioner of Internal Revenue issued his ninety-day letter advising the Petitioner, Shaffer Terminals, Inc., who will be hereinafter referred to as the "Petitioner," of the determination of deficiencies in excess profits taxes for the taxable years ended December 31, 1944, and December 31, 1945, aggregating \$42,758.29 (R. 9). A petition for the redetermination of the deficiencies so announced was filed in the Tax Court of the United States December 12, 1949, pursuant to and in accordance with Internal Revenue Code, Section 272 (R. 5 to 15). Jurisdiction of such petition is conferred upon the Tax Court of the United States by I. R. C., Section 1101.

Petitioner's tax returns of the taxes in respect of which such deficiencies were determined were filed with the Collector of Internal Revenue for the District of Washington, at Tacoma, Washington (R. 19 and 172). The decision of the Tax Court was entered February 19, 1951, pursuant to findings of fact and the opinion of said court promulgated February 16, 1951 (R. 171 and 191). Petitioner's petition for the review of that decision was filed in the Tax Court May 9, 1951 (R. 191-193). Jurisdiction of such petition is conferred upon the U. S. Court of Appeals for the Ninth Circuit by I. R. C., Section 1141.

STATEMENT OF THE CASE

The case was heard by the Tax Court upon a stipulation of facts (R. 18 to 88) and the testimony of three witnesses for the petitioner, namely, K. M. Kennell (R. 98 to 117), Samuel B. Stocking (R. 117 to 127), and Eldon E. Searles (R. 131 to 170). The Commissioner offered no testimony. The facts, therefore, are not in dispute and, with the exception of particular findings which are the subject of specific assignments of error, were fairly found by the Tax Court. Briefly stated, they are as follows:

At the commencement of World War II and throughout the period here involved, Shaffer Terminals, Inc., a corporation with a capital of \$20,000.00 only, was engaged in the business of operating warehouse terminals and storage facilities (R. 19). Its operations were conducted on leased properties for which it paid rental on a percentage basis, amounting to \$110,796.86 in 1944 and to \$73,107.56 in 1945. Its principal activity was the handling of cargo for the Federal Government, either lend-lease cargo destined for Russia or cargo for the Army and Navy Departments outward bound for Alaska or points in the Pacific Ocean (R. 21) and return salvage from the South Pacific. The proper and expeditious handling of that cargo required a certain type of equipment, namely, Clark Fork-Type Lift Trucks. At first,

Petitioner's requirements for this type of equipment had been supplied by rental from the United States Army, but with the understanding that such arrangement was temporary only.

In the middle of 1942, Petitioner's business increased very rapidly (R. 99) and with that increase came the need for additional equipment, particularly of the type mentioned. At the same time, Petitioner was continually under pressure to return or release the lift trucks rented from the Army. Prior to September 22, 1943, the Army gave Petitioner notice that this rented equipment was required for the Army's own use. The replacement of the equipment thus recaptured or to be recaptured by the Army was essential to the continuance of Petitioner's business and to meeting the demands made on it by the Army and other governmental agencies for the loading of cargo shipped over its terminal. Rental from others was unsuccessfully attempted. Acquisition seemed the only solution, but acquisition involved two problems, one, obtaining the priorities required by governmental regulations, and two, financing.

In the furtherance of the war effort, time was of the essence, and because Petitioner by reason of the work in which it was engaged was in position to secure the necessary priorities, it applied for and secured the priorities and ordered certain of this equipment before the problem of financing was solved.

Various methods of financing were considered and abandoned (R. 102, 103). One of the methods of financing so considered was the borrowing by the Petitioner from its bank of the funds necessary. This method was discouraged by the bank, which wanted the financing worked out some other way (R. 134). Such discouragement in banking practice is tantamount to advance notice that a formal application for a loan would be turned down; consequently no such application was made.

In this situation, confronted by the paramount necessity of obtaining additional equipment and by the necessity that arrangement had to be made for payment for the equipment already ordered, the stockholders of Petitioner, on or about September 22, 1943, formed an unlimited partnership known as Equipment Associates. The interests of the individuals in the corporation were decidedly unequal, but in the partnership their interests were equal, and respectively as follows:

<u>Individual</u>	<u>Interest in Petitioner Corporation</u>		<u>Interest in Partnership</u>
	<u>Number of Shares</u>	<u>Percentage of Interest</u>	
R. H. Shaffer	105	54%	25%
S. B. Stocking	72	36%	25%
K. M. Kennell	12	6%	25%
W. Hopkins	8	4%	25%

Less than a month later R. H. Shaffer died and his interests in both the Petitioner corporation and the part-

nership were acquired by the other three, the former unequally, the latter equally, so that on December 31, 1943, and thereafter, the respective interests in the corporation and partnership were:

<u>Individual</u>	<u>Interest in Petitioner Corporation</u>		<u>Interest in Partnership</u>
	<i>Number of Shares</i>	<i>Percentage of Interest</i>	
S. B. Stocking	157	78½%	One-third
K. M. Kennell	26	13%	One-third
W. Hopkins	17	8½%	One-third

The partnership thus formed was decided upon without consideration of the tax effect or consultation with either the corporation's attorney or its tax accountant and was formed solely for the purpose of acquiring the equipment required by the Petitioner in the performance of its war work and the leasing of such equipment to the Petitioner as Petitioner's needs required. (See Paragraph 2, Partnership Agreement, R. 27.) The initial capital of the partnership, Equipment Associates, was \$10,000.00, contributed equally by the original four partners. Hopkins, who as a stockholder in Petitioner had only a 4% interest therein, contributed his \$2500.00 from funds he then had on hand. Kennell, whose stock holding in Petitioner represented only a 6% interest therein, contributed his \$2500.00 to the initial capital of the partnership partially from his own funds and partially from moneys borrowed on his individual credit. The other partners' contributions were made from loans

made to them on their individual credit. The initial purchase of equipment was made with the capital so contributed. Subsequent purchases were made by the partnership with funds borrowed by the partnership, with each partner liable for the entire debt even though such loans were secured by chattel mortgages on the equipment of the partnership. It is unreasonable to suppose that the individual stockholders would have assumed such a personal liability for the corporation, wherein their interests were at the time respectively 78½ per cent, 13 per cent and 8½ per cent.

The equipment so acquired was leased to Petitioner under written agreements (R. 30). The deductibility of the rental paid by the Petitioner therefor in the determination of its excess profits tax liability is the sole question here presented. There is involved no question as to the reasonableness of such rentals. They were in accord with tariffs filed with the Public Service Commission of the State of Washington in compliance with Section 10383 of Remington's Revised Statutes. They were at the same rates and terms as the rentals paid during the years involved to the United States Army for the same type of equipment (R. 33, 34 and 100). The deductibility of the rental paid to the Army and others in the same years is unquestioned, and if the rental paid to the partnership had been paid either to the Army or others it would not have been questioned.

The partnership continued in business until June 30, 1947, when it was dissolved and liquidated (R. 183). During that time it functioned independently of the Petitioner, borrowing money, maintaining its own bank accounts, purchasing equipment with its own funds, and leasing such equipment as opportunity offered, principally to the Petitioner but also to third parties (R. 34), and paying social security, business and occupational taxes, and personal property taxes. It filed income tax returns covering that period, showing equal distribution of the partnership profits, on account of which the partners individually paid increased income taxes. Now the Government seeks additional taxes from the corporation on account of the profits on which the partners have already paid taxes. Upon liquidation of the partnership, Petitioner bought for its then depreciated value the partnership equipment, although it was under no obligation so to do (R. 30).

ASSIGNMENTS OF ERROR

1. The Tax Court erred in holding that the sale and lease agreements between Petitioner and the partnership, Equipment Associates, did not constitute sale and lease transactions recognizable for tax purposes.

2. The Tax Court erred in holding that the rentals paid by Petitioner to Equipment Associates are not proper and allowable deductions under Section 23(a)-

(1)(A) of the Internal Revenue Code in the computation of Petitioner's excess profits taxes.

3. The Tax Court erred in deciding "that there are deficiencies in excess profits taxes for the years 1944 and 1945 in the amounts of \$20,537.77 and \$22,220.52 respectively."

4. The Tax Court erred in finding as a fact that Petitioner's arrangements for the handling of cargo, and particularly lend-lease cargo destined for Russia, were in 1942 and 1943 "expected to . . . continue for the duration of the war." (R. 173).

5. The Tax Court erred in finding as a fact that the partnership, Equipment Associates, was organized "primarily to avoid the excess profits tax and its impact on the earnings of Petitioner. It was not organized for the purpose of financing the purchase of equipment which Petitioner needed in its business." (R. 184).

6. The Tax Court erred in finding and holding that "the testimony of E. E. Sarles . . . , although contradictory, is to the effect that petitioner would have been granted a short-term loan had it made application." (R. 186).

7. The Tax Court erred in finding and holding that the partnership was an agency created by Petitioner and subservient to it from which independence and control had been stripped. (R. 190).

ARGUMENT

On the main issue whether the rentals paid by Petitioner to the partnership are proper deductions in the computation of excess profits tax, which issue is presented by Assignments of Error Nos. 1, 2 and 3, Petitioner's claim that the Commissioner and the Tax Court erred in the disallowance of such deductions rests upon the following propositions:

(a) A taxpayer has the right to decrease his tax liability by any lawful means.

Gregory v. Helvering, 293 U.S. 465, 79 L. Ed. 596;

Jones v. Helvering, 63 App. D. C. 240, 71 Fed. (2d) 214, at 217; Cert. denied, 293 U. S. 583, 79 L. Ed. 679.

(b) In so doing a taxpayer has the right "to adopt the type of organization he deems to be suitable and preferable."

Coca Cola Bottling Co. of Sacramento, Ltd. v. Commissioner, 17 Tax Court_____, No. 14, promulgated July 31, 1951;

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 87 L. Ed. 1499;

Twin Oaks Co. v. Commissioner, 183 Fed.(2d) 385 (C.C.A. 9th).

(c) The partnership and the Petitioner were separate entities.

Moline Properties, Inc. v. Commissioner, 319
U. S. 436, 87 L. Ed. 1499;

National Investors Corp. v. Hoey, 144 Fed.(2d) 466
(C.C.A. 2nd);

Twin Oaks Co. v. Commissioner, 183 Fed(2d) 385
(C.C.A. 9th);

John L. Denning & Co. v. Commissioner, 180
Fed(2d) 288, (C.C.A. 10th);

*Coca Cola Bottling Co. of Sacramento, Ltd. v.
Commissioner*, 17 Tax Court....., No. 14.

(d) Being separate entities. the transactions between them cannot be disregarded for tax purposes because those transactions changed the flow of economic benefits.

Higgins v. Smith, 308 U. S. 437, 84 L. Ed. 406;

Commissioner v. Greenspun, 156 Fed(2d) 917;

Twin Oaks Co. v. Commissioner, 183 Fed.(2d)
385;

Brown v. Commissioner, 180 Fed.(2d) 926 (C.C.
A. 3rd);

Skemp v. Commissioner, 168 Fed.(2d) 598 (C.C.
A. 7th);

Shirley v. O'Malley, 91 Fed. Supp. 98.

We shall not labor the first two of the foregoing propositions. Both are now firmly established in the law of income and related taxes, and the first is conceded by the Tax Court.

The authoritative test of separate taxable entities is prescribed by the Supreme Court in the *Moline Properties Company case*, 319 U. S. at 438, 87 L. Ed. at p. 1502, as follows:

“The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of the creditors or to serve the creator’s personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.”

In *National Investors Corporation v. Hoey*, 144 Fed. (2d) at 467, Judge Learned Hand, after pointing out the errors made by the Circuit Court of Appeals for the Second Circuit in interpreting and applying prior decisions of the Supreme Court of the United States, said of the test prescribed in the *Moline Properties case* and above quoted:

“The gloss then put upon *Higgins v. Smith*, *supra*, was deliberate and is authoritative: it was that, whatever the purpose of organizing the corporation, ‘so long as that purpose is the equivalent of business

activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity'."

These tests have been applied in determining the separable taxable entity of a corporation from that of a partnership formed by the stockholders of the corporation. Thus, Judge Harron, in delivering the majority opinion of the Tax Court in the *Coca Cola Bottling Company case, supra*, which was promulgated July 31, 1951, said:

"The members of the partnership are subject to the unlimited personal liability which may develop out of the operation of the business by the partnership in place of the limited liability to which they had been subject previously as stockholders of Sacramento Company when it conducted the bottling and distributing business. The change in personal liability is evidence of the reality in the change of the form of the entity which thereafter operated the business."

In *John L. Denning & Co. v. Commissioner, supra*, Chief Justice Phillips, in delivering the unanimous opinion of the 10th Circuit, said, 180 Fed.(2d) page 290:

"We think there could be no doubt on the undisputed facts in the record that the partnership served an independent business purpose. It was owned, its capital was subscribed, and its credit was provided by three minority stockholders in the corporation. It purchased and sold broom corn. It owned its own warehouse. In so far as it used office space, facilities and employees of the corporation, and warehouse storage, it paid full value therefor

and was not favored. The corporation and the partnership kept separate books and records and the books and records of the partnership clearly reflected the business transacted by it and the income earned by it. It was organized primarily for the purpose of enabling Mrs. Effie Denning to employ her own capital and utilize her knowledge in the broom corn business at a particularly advantageous time in that business. It served a legitimate business purpose. It was not a sham. Under the undisputed facts on this record we do not think the separate entity of the corporation and the partnership may be disregarded."

In the case of *Twin Oaks Company v. Commissioner*, 183 Fed(2d) 385, decided by this Court July 20, 1950, the facts were that the stockholders of a corporation, after its operations for some time had resulted in unsatisfactory profits, "executed a partnership agreement whereby the four, as equal partners, would take over the business of the corporation," purchasing its operating assets and leasing from it the real estate on which the business had been and was then being conducted, but keeping the corporation alive "for the sole purpose of holding title to the real estate." This Court found as controlling facts that the partnership was actually formed, that the stockholders were, as members of the partnership, subjected to unlimited personal liability for the partnership debts, that the profits of the business of the partnership were thereafter distributed to the partners equally and not in proportion to their respective stock holdings in the corporation (all of which facts are present here), and held:

“These changes, all made without thought of or intent to achieve tax advantages, were, we think, far more than mere changes in form. The Tax Court felt that the fact that the profits were distributed in a different manner and in different proportions, but to the same people, indicated that the changes were formal only. The logic of this position escapes us, for it ignores the reality of the conversion from corporate to partnership operation of the business and tends in no way to show that the corporation rather than the partnership earned the income.” (Opin. 183 Fed.(2d) p. 387).

In the instant case, the partnership, Equipment Associates, formed by the stockholders of the Petitioner corporation meets all the tests of a separate taxable entity. It was actually formed. There was no fraud in its formation or subsequent business activities. Its initial capital was contributed equally by the partners and in shares utterly disproportionate to their stock holdings in Petitioner. It was recognized as a separate entity by the Bank from which it borrowed money, for the repayment of which each partner was individually fully liable. It was recognized as a separate entity by the taxing authorities of the State of Washington, to which it paid social security and business or occupational taxes. and by the taxing authorities of the United States, to which it made income tax returns, and it distributed its profits equally to its members.

The Tax Court did not find that the Petitioner and the partnership were not separate entities. It did not

find that the organization of the partnership was not “followed by the carrying on of business” by it. It made no finding on either of these points, although the facts that the Petitioner and the partnership were separate entities and that after its organization the partnership carried on business are established beyond question by the record. On the contrary, the Tax Court found:

“The stockholders of Petitioner organized the partnership primarily to avoid the excess profits tax and its impact on the earnings of Petitioner.” (R. 184).

This finding is clearly erroneous because directly contrary to unimpeached and wholly uncontradicted testimony. It is the subject of a special assignment of error and will be discussed in more detail later. But, even if warranted, it is a finding as to purpose or motive. Since the decision in *Moline Properties, Inc. v. Commissioner*, 319 U. S. 436, 87 L. Ed. 1499, purpose, at least in the absence of fraud, is immaterial “so long as that purpose is the equivalent of business activity or is followed by the carrying on of business.”

(d) The transaction between Petitioner and the partnership changed the flow of economic benefits.

The Tax Court rested its decision upon the conclusion:

“Upon close scrutiny, this entire plan is not, in

substance, a sale and lease transaction recognizable for tax purposes . . ." (R. 189).

In turn, it based that conclusion on the proposition that "control over the property (i.e., the equipment of the partnership, Equipment Associates) remained in Petitioner." (R. 187).

The Tax Court purported to make a realistic approach to the question of tax liability upon the principle said by it to have been initiated by the Supreme Court of the United States in *Gregory v. Helvering*, 293 U. S. 465, 79 L. Ed. 596, namely: "Whether the transaction under scrutiny is in substance what it purports to be in form." (R. 187). The principle so broadly stated was repudiated by the Supreme Court in *Higgins v. Smith*, 308 U. S. 437, 84 L. Ed. 406, in the following language:

"The Government urges that the principle underlying *Gregory v. Helvering* finds expression in the rule calling for a realistic approach to tax situations. As so broad and unchallenged a principle furnishes only a general direction, it is of little value in the solution of tax problems. If, on the other hand, the *Gregory* case is viewed as a precedent for the disregard of a transfer of assets without a business purpose but solely to reduce tax liability, it gives support to the natural conclusion that transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration."

(Opin. 308 U. S., p. 476, 84 L. Ed. 410).

Conversely stated, the principle or rule established by *Higgins v. Smith* is that transactions which either vary control or change the flow of economic benefits are not to be disregarded in the determination of tax liability. The rule was so interpreted by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner of Internal Revenue v. Greenspun*, 156 Fed.(2d) 917, when it held:

“The Tax Court, we think correctly interpreted *Higgins v. Smith, supra*, . . . as authority, in short, for the view that transactions which do not in reality vary control, or change the business aspects of a situation are to be dismissed from consideration in determining tax incidents.” (Opin. 156 Fed.(2d) 920).

The rule or principle so interpreted was applied by this Court in *Twin Oaks Company v. Commissioner*, 183 Fed.(2d) 385.

See also:

Brown v. Commissioner, 180 Fed.(2d) 926 (C.C.A. 3rd);

Ross v. Commissioner, 129 Fed.(2d) 310 (C.C.A. 5th);

Shirley v. O'Malley, 91 Fed. Supp. 98 (D.C.D. Nebr.)

The present case falls within and is governed by that rule, because it is indisputable that the transactions between the Petitioner and the partnership, Equipment

Associates, changed the flow of economic benefits. (See Findings of the Tax Court, R. 182-3).

The Tax Court wholly disregarded the fact of the change in the flow of economic benefits effected by these transactions and rested its decision upon the proposition that there was in fact no change in the control of the equipment. Under the rule here being considered, the existence of *either* a change in control *or* a change in the flow of economic benefits precludes disregard of the transaction in determining tax incidents.

Undoubtedly it will be contended that the decision of the Tax Court is supported by *W. H. Armston Co. v. Commissioner*, 188 Fed.(2d) 531 (C.C.A. 5th). That case is clearly distinguishable. There, the transaction was between a corporation and its principal stockholder, Catherine Armston, who, with her husband, "owned virtually all of the stock in W. H. Armston Co., Inc." The transaction worked no change in the flow of economic benefits. Furthermore, in that case the corporation had in previous years acquired the equipment which it sold to Catherine Armston and there was not present the problem of financing additional equipment needed by the corporation. Her purchase thereof was not financed with her own funds or personal credit independent of the corporation, but on security of stock in the corporation pledged by her. Here, the initial purchase of equipment by the partnership was financed by the partnership,

wholly independently of the corporation and with capital contributed equally to the partnership by each of the partners wholly from his own funds either previously accumulated or secured on his personal credit. Subsequent purchases by the partnership were financed by it independently of Petitioner (R. 177).

Upon the issue whether the transactions between Petitioner and the partnership are recognizable for tax purposes, we submit the case is in all essential particulars parallel to and governed by the decision of this Court in *Twin Oaks Co. v. Commissioner*, 183 Fed.(2d) 385. The following language from Judge Lindley's opinion in that case applies with full force here, namely:

“It seems clear to us, however, that the Tax Court, in its characterization of the change in business structure involved in the instant case as sham and a mere form without substance, has, in effect denied the taxpayers the legal right to conduct their business affairs through a medium of their own choice.”

ASSIGNMENTS OF ERROR AS TO PARTICULAR FINDINGS

In considering these assignments of error, namely, Assignments of Error 4 to 7, inclusive, it is to be remembered, (1) that the Commissioner offered no testimony, and (2) that the decision of the Tax Court was by a single judge.

In general, these several assignments of error as to particular findings or holdings of the Tax Court are based upon the following propositions of law:

“The finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

U. S. v. U. S. Gypsum Co., 33 U. S. 364, 395, 92 L. Ed. 746, 766.

“It is axiomatic that uncontradicted testimony must be followed.”

Grace Bros. v. Commissioner, 173 Fed.(2d) 170, at 174 (C.C.A. 9th).

“It (the Tax Court) may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted.”

A & A Tool & Supply Co. v. Commissioner, 182 Fed.(2d) 300, at 304 (C.C.A. 10th).

See also:

J. H. Robinson Truck Lines v. Commissioner, 183 Fed.(2d) 739 (C.C.A. 5th).

The finding that Petitioner’s arrangements for the handling of cargo were “expected to . . . continue for the duration of the war” (Assignment of Error 4) is directly contrary to the competent, relevant, unimpeached and uncontradicted testimony of K. M. Kennell.

He testified in respect to the duration of the use of the equipment purchased by the partnership, as follows:

“A use for it might be ended at any time. It was in this lend-lease operation with Russia, to Vladivostok and similar points on the Pacific Coast of Siberia. The threat of the Japanese interrupting that lend-lease line was ever present, and no one knew from one day to the next whether that line was going to be permitted to stay open or not.” (R. 105).

and on cross-examination Mr. Kennell testified that Petitioner was operating under no contracts but simply an arrangement under which “we handled cargo they sent to us day by day.” To the question asked by Mr. Picco:

“But you expected and contemplated and expected that this arrangement would continue during the duration of the war period, did you not?”

he answered:

“In part, that may be true, sir, but as I explained in answer to the question a moment ago, no one knew how long the Russian supply line would be left open, that was in the hands of the Japanese.” (R. 107).

Likewise, the finding that the partnership was organized “primarily to avoid the excess profits tax” and not “for the purpose of financing the purchase of equipment which Petitioner needed in its business,” (Assignment

of Error 5) is directly contrary to the testimony of the said K. M. Kennell. He testified, without impeachment or contradiction, that in August of 1943 "We (the Petitioner) were already borrowing as heavily as we could hope to, from the bank, because of the tremendous amounts of accounts receivable we were having to carry," (R. 103) and "The corporation's net returns in any year during that period could not possibly sustain the investment that would be necessary in equipment." (R. 105).

In this he is fully corroborated by the testimony of Mr. E. E. Searles, Vice-President of Puget Sound National Bank (R. 138, 140, 163, 168).

Mr. Kennell further testified that the purpose of the partnership, Equipment Associates, was the financing of the acquisition of the lift-truck type of equipment (R. 117), and in this he is corroborated by paragraph 2 of the Partnership Agreement (R. 27). On cross-examination he testified as follows:

Q. Why was it necessary to form this partnership, if all the answers you have given me are true?

A. The answer, Mr. Picco, is quite obvious. That is, that our net position was not going to be sufficient to permit us to finance this equipment, plus other equipment that was contemplated with other business that was being considered for us by the Army and others, and the necessity of tying up so much of our funds in the nature of accounts receivable and other forms of working capital. (R. 108-9).

Q. Actually, is it not true that the only reason for forming that partnership was to operate (exclude or reduce) the excess profits tax from these payments?

A. Had that been our intention, sir, we would have changed our corporation to a partnership and taken the benefit of it on all our other transactions. (R. 110).

Further, on cross examination, he testified in effect that the Bank definitely indicated that it was not in a position to loan money to the Petitioner for the equipment in addition to the loans they were then carrying, that an equipment loan would be a capital loan and they could not see where the Petitioner could earn the money to repay it; that their banker did not say "he would not loan at all. He said it wasn't the proper loan to make at that time." (R. 112).

As to the finding that the testimony of E. E. Searles "is to the effect that Petitioner would have been granted a short-term loan had it made application" (Assignment of Error 6) we submit that on a careful reading and consideration of Mr. Searle's testimony (R. 129 to 170) this Court will be convinced that the finding is unjustified and clearly erroneous.

Searles at no time testified that in 1943 a loan to purchase equipment would have been made to Petitioner if it had applied therefor. Quite the contrary. In the

initial discussion regarding the financing of the acquisition of the needed equipment, he “discouraged the borrowing by the Corporation,” (R. 134) and again to the same effect (R. 140). As previously stated, a banker’s discouragement is but his polite way of serving notice that formal application for such loan would be useless. He further testified, in response to the question whether the Bank would have made loans to the Petitioner for the same purpose and on the same basis as they did to the partners of Equipment Associates and to the partnership:

“No, I don’t think we would, because they were not entitled to it.” (R. 138).

On cross-examination he testified that he would not have recommended a loan of approximately \$9,500.00 to the Petitioner in September and October of 1943. He said, “It might have gone through, but I would not have recommended it.” (R. 142) See also his testimony R. 148 and 154.

On his redirect examination the following occurred:

Q. You said definitely you would not recommend a loan to Shaffer Terminals on a question of credit, but you said it might have gone through. Do loans normally go through against your recommendation?

A. Oh, no, not against recommendation, no. Normally they do not, no.

Q. It would be a very unusual thing if the loan would have gone through?

A. It would be, with the senior officer recommending. (R. 163).

And on recross examination he reiterated that if the Petitioner had come in for a loan in September or October of 1943 and if he knew that the purpose of that loan was to buy equipment, he would not have recommended the loan (R. 168).

The most that can be said for his testimony is that under adroit cross examination he came close to saying, but did not actually say, that if in September or October of 1943 he, or the Bank, had known or could have foreseen the results of Petitioner's operations during the years 1944 or 1945 (R. 164-5) the Bank might have made an equipment loan to Petitioner if all the stockholders had endorsed the paper (R. 169-70).

As to the finding or holding that the partnership was a subservient agency created by Petitioner from which independence and control had been stripped (Assignment of Error 7), we submit that it has been demonstrated under our discussion of the proposition that the Petitioner and the partnership were separate taxable agencies, that the partnership was not created by the corporation but was at all times a separate and independent jural and taxable entity. Accordingly, this par-

ticular finding or conclusion, whatever it may be, is also clearly erroneous.

There being no question that the rents paid by Petitioner to Equipment Associates were not excessive or that Petitioner was legally obligated to pay the same, or that rents paid in the ordinary course of business are allowable deductions in the computation of excess profits taxes under Section 23(a)(1)(A) of the Internal Revenue Code, we submit the decision of the Tax Court should be reversed and either the deficiencies in Petitioner's excess profits taxes for the years 1944 and 1945 expunged, or the case remanded to the Tax Court with directions to enter judgment in accordance with the prayer of Petitioner's petition to that Court to review the Commissioner's determination in respect of such deficiencies.

Respectfully submitted,

HENRY C. PERKINS,

FREDERICK D. METZGER,

Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel.

No. 12,973

In the United States Court of Appeals
for the Ninth Circuit

SHAFFER TERMINALS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES (

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General

ELLIS N. SLACK,
A. F. PRESCOTT,
VIRGINIA H. ADAMS,

Special Assistants to the Attorney General.

FILED

OCT 15 1951

PAUL F. O'BRIEN
CLERK

INDEX

Opinion Below	Page
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Statement	3
Summary of Argument	8

Argument:

The so-called "rental" payments here involved did not qualify as deductible business expenses under the statute	9
Conclusion	26

CITATIONS

Cases:

<i>Armston v. Commissioner</i> , 12 T.C. 539	14
<i>Armston, W. H., Co. v. Commissioner</i> , 188 F. 2d 531	8, 9
<i>Bazley v. Commissioner</i> , 331 U. S. 737	10
<i>Brown v. Commissioner</i> , 180 F. 2d 926	23
<i>Commissioner v. Court Holding Co.</i> , 324 U. S. 331	10
<i>Commissioner v. Culbertson</i> , 337 U. S. 733	22
<i>Commissioner v. Greenspun</i> , 156 F. 2d 917	9, 23
<i>Commissioner v. Sunnen</i> , 333 U. S. 591	14
<i>Commissioner v. Tower</i> , 327 U. S. 280	10
<i>Deputy v. du Pont</i> , 308 U. S. 488	9
<i>Gregory v. Helvering</i> , 293 U. S. 465	10
<i>Griffiths v. Commissioner</i> , 308 U. S. 355	10
<i>Helvering v. Clifford</i> , 309 U. S. 331	14
<i>Higgins v. Smith</i> , 308 U. S. 473	10, 20
<i>Illinois Agricultural Hold. Co. v. Commissioner</i> , 131 F. 2d 583	9, 25
<i>Ingle Coal Corp. v. Commissioner</i> , 174 F. 2d 569	9
<i>Interstate Transit Lines v. Commissioner</i> , 319 U. S. 590	9
<i>Limericks, Inc. v. Commissioner</i> , 165 F. 2d 483	9
<i>Minnesota Tea Co. v. Helvering</i> , 302 U. S. 609	10
<i>New Colonial Co. v. Helvering</i> , 292 U. S. 435	9
<i>Paramount-Richards Th. v. Commissioner</i> , 153 F. 2d 602	9
<i>Rand v. Helvering</i> , 77 F. 2d 450	16
<i>Regensburg v. Commissioner</i> , 144 F. 2d 41, certiorari denied, 323 U. S. 783	9
<i>Skemp v. Commissioner</i> , 168 F. 2d 598	23
<i>Twin Oaks Co. v. Commissioner</i> , 183 F. 2d 385	24

Statute:

Internal Revenue Code, Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	2
--	---

Miscellaneous:

Treasury Regulations 111, Sec. 29.23(a)-1	3
---	---

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,973

SHAFFER TERMINALS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 172-190) are reported at 16 T.C. 356.

JURISDICTION

The petition for review (R. 191-193), which was filed May 9, 1951 (R. 193), and involves deficiencies in excess profits tax of \$20,537.77 and \$22,220.52 for the years 1944 and 1945, respectively. On September 23, 1949, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$42,758.29. (R. 9-15.) Within ninety days thereafter and on December 12, 1949, the taxpayer filed a petition

with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 5-15.) The decision of the Tax Court sustaining the deficiency was entered February 19, 1951. (R. 191.) The case is brought to this Court by a petition for review filed May 9, 1951 (R. 191-193), pursuant to Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether so-called "rental" payments made by taxpayer corporation to a partnership composed of taxpayer's sole stockholders were deductible as "ordinary and necessary" business expenses under Section 23(a) (1) (A) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 23 [As amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In general*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to

which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.23(a)-1. *Business Expenses*.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business * * *. * * * Among the items included in business expenses are management expenses * * * and rental for the use of business property. * * *

STATEMENT

The facts as stipulated (R. 18-26) and found by the Tax Court (R. 172-184) may be summarized as follows:

Taxpayer is a corporation engaged in the business of operating warehouse terminals and storage in Tacoma, Washington. On October 20, 1943, R. H. Shaffer, one of taxpayer's four shareholders, died. His shares of stock in taxpayer were acquired by the surviving shareholders. (R. 172.) On December 31, 1943, the capital stock of taxpayer was held as follows (R. 173):

Shareholder	Shares	% of Ownership
Samuel B. Stocking [president]	157	78.5
K. M. Kennell [vice-president-secretary]	26	13
W. Hopkins [treasurer]	17	8.5
	<hr/>	<hr/>
[Total]	200	100

The business of taxpayer increased very rapidly and continuously from July 1942 through 1943 and the subsequent war years. This increase was due to war business provided by the United States Army and Navy, the Russian Government and the British Government.

Taxpayer handled various cargoes for these contractors on a daily basis, under an arrangement with the named governments, which was expected to and did continue for the duration of the war. (R. 173.)

Early in 1943, due to the increase in business and the increasing pressure from the army for the return of rented equipment, it became apparent to the officers of taxpayer that additional equipment, such as clark-fork type lift trucks, should be acquired, and the officers of taxpayer began considering the feasibility of purchasing new equipment. Informal discussions were had with E. E. Searles, vice president of the Puget Sound National Bank, concerning the purchase of equipment and the possibility of obtaining a loan for this purpose. No formal loan application was made by taxpayer for consideration by the loan committee of the bank. This equipment was essential war material and could not be acquired except on priority. Taxpayer could obtain the priority because of its essential war activities. Taxpayer applied for and was granted priority to purchase new equipment in April 1943. (R. 173, 174, 182.)

On September 22, 1943, a partnership was organized by the four original stockholders of taxpayer under the style of Equipment Associates (sometimes hereinafter referred to as the partnership). Subsequent to the death of R. H. Shaffer on October 20, 1943, decedent's interest was acquired equally by the surviving partners and the business was conducted as a partnership under the same name. The partnership agreement stated that the purpose and business of the copartnership was primarily to furnish certain equipment, such as dock tractors, lift trucks, etc., for the exclusive use of Shaffer Terminals, Inc., in essential war work, which equipment was to be leased by the partnership to taxpayer. The agreement further provided that, when not being

used by taxpayer, and with its consent, the equipment could be temporarily leased to others. (R. 174-175.)

The capital invested in Equipment Associates consisted solely of cash furnished in equal amounts by the partners. Each partner contributed \$2,500. The investment made by W. Hopkins was from his personal funds. Investments made by the other partners were in part from personal funds and in part from bank loans. (R. 175.)

The affairs of Equipment Associates were managed by Samuel B. Stocking, for which he was paid \$200 per month, and its books of account were kept by E. A. Seaton, for which he was paid \$30 per month, both items being deductions before partners' distribution of earnings. E. A. Seaton was also the regular bookkeeper for taxpayer. Equipment Associates employed no other employees. It used the office of taxpayer for which no rent or charge was paid. Taxpayer and Equipment Associates kept separate books and records and there was no intermingling of the partnership and corporate funds or records. The partnership owned no other property except the terminal equipment leased to taxpayer. (R. 175-176.)

Subsequent to September 22, 1943, and at all times here material, taxpayer obtained the necessary priorities and purchased equipment similar to that already described above. The partnership did not apply for priorities. Taxpayer made these purchases on September 30, 1943, March 21, 1944, and June 16, 1945, for the respective sums of \$9,529.44, \$10,298.60, and \$10,319.61. After each purchase, taxpayer transferred legal title to the equipment to the partnership, pursuant to certain "Sale and Lease Agreements" executed in October 1943, in March 1944, and in June 1945, and received the partnership's checks in payment either before or within

a month after taxpayer's check in payment of the equipment had cleared. (R. 176-177.)

The first purchase of equipment by the partnership was paid for out of the original contributions of capital made by the partners. The second and third purchases were financed by separate loans obtained from the Puget Sound National Bank of Tacoma, upon the basis of chattel mortgages and the increased earnings of the partnership. These loans were classified as commercial or short term, and notes therefor were drawn on terms of 90 days. (R. 177, 183.)

All of the sale and lease agreements were substantially similar in terms to the "Sale and Lease Agreement" executed October 8, 1943, differing only as to date and the amount of the sales value of the equipment. The "Sale and Lease Agreement" executed October 8, 1943, provides in part that taxpayer had sold and transferred the equipment which it had purchased to Equipment Associates for the sum of \$9,529.44. (R. 177-178.)

Under the "Sale and Lease Agreement" taxpayer reserved the exclusive right to lease the equipment from Equipment Associates during the entire time of the emergency created by the war. (R. 178.)

In the event Equipment Associates determined to dispose of any of the equipment, taxpayer was given the first right to purchase the equipment at a price to be agreed upon by the parties to the agreement. (R. 178.)

The rentals paid by taxpayer to the partnership were in accord with Tacoma Terminal Tariffs filed with the Public Service Commission of the State of Washington in compliance with Section 10383 of Remington's Revised Statutes of Washington. The amounts paid in 1944 and 1945 respectively were \$41,134.82 and \$29,434.46. The total amount paid in rentals for the equipment from 1943 to 1947 was \$90,144.10. (R. 179-180.)

During the period here involved—1944 and 1945—no dividends were declared by taxpayer. Prior to this period the last dividend was in 1942, and the first dividend after this period was in January 1946, in the amount of \$12,000. (R. 180.)

A summary of taxpayer's working capital position at the end of the tax years, and on or about the dates when the equipment was acquired shows that on or about each of the dates on which equipment was purchased, taxpayer's cash balance exceeded the cost of the equipment by a substantial margin. Taxpayer's earned surplus on December 31, 1944, and December 31, 1945, was \$67,-303.28 and \$68,922.29, respectively. (R. 180-182.)

The Puget Sound National Bank had made loans to taxpayer during the years from 1930 to 1941 when taxpayer's record was not too satisfactory. During the years 1942 to 1945 taxpayer's financial statements showed additional strength and the size of the loans was increased. These loans were usually made for short terms upon assignment to the bank of accounts receivable and were primarily used to meet current expenses. (R. 182.)

The gross profits of the partnership, as shown by its income tax returns for 1944, 1945 and 1946, were \$41,468.32, \$30,568.07, and \$11,725.32, respectively. From January 1 to June 30, 1947, the date on which the partnership was dissolved, its gross profit was \$912.72. (R. 183.)

On April 23, 1947, the partnership transferred part of the equipment covered by the "Sale and Lease Agreements" back to taxpayer for the sum of \$10,-613.49, the book value of the equipment, plus sales tax of \$318.40. The remaining equipment was distributed in final liquidation on June 30, 1947, to the individual partners who transferred it to taxpayer on October 27, 1947, for a total consideration of \$7,500. The book

value, or depreciated value of this equipment was \$7,223.73 on December 31, 1946. (R. 183.)

Taxpayer's profits were such that it already was in the 90 per cent bracket under the excess profits tax, and no substantial benefit would have resulted from taxpayer acquiring the necessary equipment. The stockholders of taxpayer organized the partnership, primarily to avoid the excess profits tax and its impact on the earnings of taxpayer. It was not organized for the purpose of financing the purchase of equipment which taxpayer needed in its business. (R. 184.)

SUMMARY OF ARGUMENT

Under the facts here, the Tax Court correctly found that the sale-lease arrangement between the corporation and its majority stockholder was not in substance what it appeared to be in form and accordingly that it has no effect for tax purposes. The corporation's full control over, and right to use, the equipment sold to the partnership whose members owned all of the stock of the corporation, was not altered in any respect by the transfer of title. The alleged business reason for the arrangement, to provide the corporation with additional working capital, was not, and could not have been achieved, since the corporation's obligation to pay rentals for the equipment allegedly sold effectively removed the amount received as the "sale" price from the partnership from availability as working capital. Since the alleged business reason was nonexistent, the only other purpose for the arrangement suggested by the record was to create "rentals" which would form the basis for a tax deduction and thus reduce the corporation's income and excess profits taxes commencing in 1943. Because the arrangement was nothing but a tax-avoidance device, with no business purpose, it is to be disregarded for tax purposes, under the principle stated in *W. H.*

Armston Co. v. Commissioner, 188 F. 2d 531, and *Commissioner v. Greenspun*, 156 F. 2d 917, 920. Each case turns on its own facts, and other cases, having factual differences, consequently cannot control in this case.

ARGUMENT

The So-called "Rental" Payments Here Involved Did Not Qualify as Deductible Business Expenses Under the Statute

This case involves the question of whether the so-called "rental" payments made by taxpayer corporation to a partnership composed of its sole stockholders were deductible under Section 23(a)(1)(A) of the Internal Revenue Code, *supra*. That section authorizes the deduction from gross income of:

All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

Needless to say, so-called "expenses" are often in reality dividend distributions or some other form of non-deductible payments, and the burden is on the taxpayer to prove that claimed deductions are allowable. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590; *Deputy v. duPont*, 308 U.S. 488; *New Colonial Ice Co. v. Helvering*, 292 U.S. 435; *Ingle Coal Corp. v. Commissioner*, 174 F. 2d 569 (C.A. 7th); *Limericks, Inc. v. Commissioner*, 165 F. 2d 483 (C.A. 5th); *W. H. Armston Co. v. Commissioner*, 188 F. 2d 531 (C.A. 5th); *Illinois Agricultural Hold. Co. v. Commissioner*, 131 F. 2d 583 (C.A. 7th); *Paramount-Richards Th. v. Commissioner*, 153 F. 2d 602, 604 (C.A. 5th); *Regensburg v. Commissioner*, 144 F. 2d 41 (C.A. 2d), certiorari

denied, 323 U.S. 783. Moreover, "The mere fact that the expense was incurred under contractual obligation does not, * * * make it the equivalent of a rightful deduction under Section 23(a)". *Interstate Transit Lines v. Commissioner, supra*, p. 594.

It is axiomatic that tax consequences flow from the substance of a transaction rather than its form, and that transactions between a corporation and its controlling stockholders are subject to special scrutiny. *Commissioner v. Court Holding Co.*, 324 U.S. 331; *Gregory v. Helvering*, 293 U.S. 465; *Higgins v. Smith*, 308 U.S. 473; *Minnesota Tea Co. v. Helvering*, 302 U.S. 609; *Griffiths v. Commissioner*, 308 U.S. 355; *Bazley v. Commissioner*, 331 U.S. 737; *Commissioner v. Tower*, 327 U.S. 280. It may be noted preliminarily that the "rental" payments here involved admittedly were made to taxpayer's stockholders (R. 184), were made during years when taxpayer's business was increasing very rapidly, when the excess profits tax was in effect, and when taxpayer was in the 90% bracket.

The critical facts are not in dispute. Taxpayer corporation, having need for heavy dock equipment, its sole stockholders formed a partnership, for the purpose, as stated in the partnership agreement, of purchasing the necessary equipment and renting it to taxpayer. The capital invested in the partnership consisted solely of cash furnished equally by the partners, in the total amount of \$10,000,¹ most of which was obtained by the partners on short term (90-day) bank loans. (R. 23, 177.) This original invested capital was used to finance the first purchase of equipment, and two subsequent purchases were financed by bank loans to the partner-

¹ The original contributions were \$2,500 each from Messrs. Shaffer, Stocking, Kennell and Hopkins. Upon the death of Mr. Shaffer in October, 1943, the remaining three partners purchased his interest in equal shares.

ship, based upon the increased earnings of the partnership. The loans were secured by chattel mortgages on the equipment. The total purchase price of all the equipment amounted to \$30,147.65. The equipment could not be acquired except on priorities, which were obtained, not by the partnership, but by taxpayer. As to each of the three separate purchases of equipment which were made, taxpayer ordered the equipment *and paid for it*. After each purchase taxpayer transferred legal title to the equipment to the partnership, pursuant to certain "Sale and Lease Agreements", and was reimbursed the amount of the purchase price by the partnership. Upon the acquisition by the partnership of the legal title to the equipment, taxpayer "rented" the equipment from the partnership, paying some \$90,000 in "rentals" between October, 1943 and June, 1947, when the partnership was liquidated and dissolved.² Just prior to its dissolution the partnership sold part of the equipment to taxpayer for \$10,613.49, plus a sales tax. Upon dissolution the remaining equipment was distributed to the partners who sold it to taxpayer for \$7,500. (R. 183.)

The deductibility of the "rental" payments thus depends upon whether the series of transactions comprising the formation of the partnership and the "Sale and Lease Agreements" were in substance what they appeared to be in form. Only if they were, can they be effective for tax purposes. *W. H. Armston Co. v. Commissioner, supra, Ingle Coal Corp. v. Commissioner, supra.*

The Tax Court found that the partnership was not organized by taxpayer's stockholders for the purpose of financing the purchase of the equipment, but was organized "primarily to avoid the excess profits tax

² The amount of so-called "rentals" here in issue is \$70,569.28—the payments made in 1944 and 1945. (R. 180.)

and its impact on the earnings of petitioner” (R. 184), and that finding compelled the conclusion reached by the Tax Court (R. 189) that:

* * * this entire plan is not, in substance, a sale and lease transaction recognizable for tax purposes and we therefore hold that the amounts paid the partnership by petitioner are not deductible as rent under section 23(a)(1)(A) of the Code.

It is submitted that this ultimate factual conclusion (*Limericks, Inc. v. Commissioner, supra*), far from being clearly erroneous, is fully supported by the record. A brief resume of the provisions of the agreements and the surrounding circumstances will suffice to show that none of the transactions here involved served any real business purpose for the taxpayer, but that, on the contrary, taxpayer remained in the same position with respect to the equipment as if none of the transactions had taken place.

Since the parties involved were taxpayer and its sole stockholders, the same persons controlled the policies of both the “lessor” and the “lessee”. Those persons had it within their power to alter the agreements or release either of the parties thereto at any time. (R. 115.) Moreover, even under the terms of the agreements, taxpayer at all times retained complete control over the equipment which it had supposedly “sold” to the partnership. The agreements gave to the partnership only the bare legal title. Thus the “partnership agreement” provided that the purpose and business of the partnership was to hold the equipment for the exclusive use of Shaffer Terminals. (R. 27.) It further provided that the equipment could be leased to others only “when not being used” by taxpayer, and then only with its consent and approval. (R. 27.) The “Sale and Lease” agreements reserved to taxpayer the “exclusive right” to use the equipment (R. 30), and granted tax-

payer "first right to purchase" it in the event the partnership should determine to sell (R. 31). There is among these conditions, no indication of the unconditional and irrevocable conveyance of the property which is necessary in order to constitute a true sale. On the contrary, as taxpayer's own witness admitted (R. 115) the partnership was never "free to dispose of the equipment or use the equipment in any way", and it is patent that the transfer to the partnership would not have occurred except upon the condition that the "lease" back to taxpayer of the equipment would simultaneously follow. The "Sale" and "Lease", contained in the same instrument, were obviously interdependent and conditional upon each other, and the Tax Court recognized this when it said (R. 187-188) :

The net effect of the agreement was to strip the partnership of all incidents of ownership, vesting in it only bare legal title while control over the property remained in petitioner. Such a reservation of control contradicts a sale which presupposes that the seller loses not only title but control. *Esperson v. Commissioner* (C.A., 5th Cir.), 49 Fed. (2d) 259; *Schoenberg v. Commissioner* (C.A., 8th Cir.), 77 Fed. (2d) 446. Such command over the property marks petitioner as the real owner for income tax purposes. *Commissioner v. Court Holding Co.*, 324 U.S. 331.

A matter of the utmost significance is the fact that the partnership was formed shortly after taxpayer's business had experienced a very rapid increase (R. 99) which had the effect of placing taxpayer in the 90% bracket under the excess profits tax; and the partnership was dissolved in 1947, after the repeal of the excess profits tax, at which time legal title to the equipment was reconveyed to taxpayer (R. 25-26, 183). It was stipulated (R. 24) that, before deciding to organize the partnership, the stockholders considered the fact that

taxpayer was in the 90% bracket. It is thus clear that the partnership was created for a limited purpose and was never regarded as a permanent organization. From the very beginning, it was contemplated that it would not be necessary for any partner to devote any appreciable time to the business of the partnership. (R. 113.) The partnership had no office except the office of taxpayer, and it hired no employee except a bookkeeper who was actually the regular bookkeeper for taxpayer. (R. 123.) In short, the partnership was never really intended to be more than a holder of legal title to the equipment used by taxpayer in its business. To be sure, it had transferred title to the equipment, but in the circumstances it was only a bare legal title, with all the effective rights of ownership retained by the corporation. Cf. *Helvering v. Clifford*, 309 U.S. 331; *Commissioner v. Sunnen*, 333 U. S. 591, 607-610.

Superimposed upon all of these circumstances is the highly important fact that during the years involved taxpayer discontinued payment of its dividends. (R. 23.)

It is apparent upon analysis of all the facts that the present case is, in all essential respects, indistinguishable from *Armston v. Commissioner*, 12 T.C. 539, affirmed, 188 F. 2d 531 (C.A. 5th). In that case the taxpayer was a corporation engaged principally in the construction business. In the taxable years, roughly 39% of its outstanding stock was owned by W. H. Armston, 60% by his wife, Catherine G. Armston, and 1% by K. W. Kerr. In 1943, taxpayer sold its construction equipment, which was essential to the operation of its business, to Catherine G. Armston for approximately \$30,000, the price being determined by the taxpayer's book value as of February 1, 1943. Catherine G. Armston had to borrow the amount of the purchase price in order to finance the transaction. Simultaneously with

the sale, Catherine G. Armston leased back the equipment to taxpayer at a "rental" equal to prevailing comparable rentals. As pointed out by the Tax Court (R. 189) the facts here are even stronger than those presented in the *Armston* case, since there the lessor possessed control over the use of the equipment and full right of sale, whereas here no such right existed. Taxpayer argued, as taxpayer does in the instant case, that it sold the equipment in order to obtain needed working capital, because (188 F. 2d 531, 532) :

* * * it was not good business for the company to have substantially all of its capital and surplus tied up in heavy fixed equipment when funds were needed for the payment of current debts and capital was required for payrolls * * *

There, as here, no dividends were paid by taxpayer during the taxable years, but, in the *Armston* case, taxpayer paid "rentals" totaling over \$167,000 for the three years involved. The Court of Appeals for the Fifth Circuit, in affirming the Tax Court's decision that the "rentals" were not deductible, said (p. 533) :

The evidence here conclusively reveals that the Company's right to use the equipment supposedly sold to Catherine Armston was in no wise affected by the alleged transfer of title. The only logical motive and purpose of the arrangement under consideration was the creation of "rentals", which would form the basis for a substantial tax deduction, and thereby reduce the Company's income and excess profits taxes from the year 1943. It was merely a device for minimizing tax liability, with no legitimate business purpose, and must therefore be disregarded for tax purposes. [citing cases]

It is submitted that the finding of the Tax Court (R. 184) that the partnership was organized "primarily to avoid the excess profits tax and its impact on the earnings of petitioners" was equally justified here. Tax-

payer's contention (Br. 24-25) that such finding constitutes error because "directly contrary to the testimony of the said K. M. Kennell" is without merit. The Tax Court was not bound to believe or accept the testimony of Mr. Kennell, even if uncontradicted. Under such circumstances, the testimony of interested parties may properly be regarded as "insufficient to carry the burden of proof resting on the taxpayers." *Rand v. Helvering*, 77 F. 2d 450, 451 (C. A. 8th). This is especially true where the undisputed facts give rise to inferences which support the trial court's decision.

Moreover, Mr. Kennell's testimony that taxpayer's finances were not sufficient to justify its purchase of the equipment will not bear analysis. On the contrary, the record clearly demonstrates that the purchase of the equipment was warranted by taxpayer's financial condition. Taxpayer had ample working capital to pay for the equipment on each of the purchase dates, and *actually did* make such payments. As a matter of fact, on the dates of each of the first two purchases, taxpayer's cash on hand totaled approximately three times the amount of the purchase price, and on the date of the last purchase, its cash on hand totaled six times the purchase price. On September 30, 1943, when the partnership was organized and the first purchase of equipment, costing \$9,500 was made, taxpayer had over \$28,000 in cash and approximately \$135,000 in accounts receivable. On each of the purchase dates, taxpayer's receivables exceeded its payables by a very substantial margin. This firm financial condition existed not only on the dates on which the purchases were made, but prevailed all during the period from the first purchase on September 30, 1943, through the third purchase on June 16, 1945. (R. 181.) Moreover, taxpayer's accounts receivable were, in the main, accounts of the United States Army and Navy, and the British and Russian

governments. Taxpayer could thus anticipate that a very high percentage of them would be paid, and such was actually the case. For example, taxpayer grossed over \$490,000 in 1944 (R. 38) and over \$390,000 in 1945 (R. 56), yet of these amounts, only 16.4% remained unpaid and on the books as accounts receivable at the end of 1944 (R. 41), while less than 9% remained unpaid at the end of 1945 (R. 59). In short, as the Tax Court observed (R. 185), "petitioner's working capital position at the time of the various purchases * * * was ample to cover checks drawn on its account". This is all the more apparent when it is considered that within the first four months after the first purchase of equipment taxpayer had paid "rentals" totaling just \$354 less than the entire cost of that purchase; that nine months after the first purchase the "rentals" paid equalled the cost of the first and second purchases, and that eleven months after the first purchase taxpayer had paid the partnership an amount equal to the cost of all three purchases of equipment. (R. 33.) Thus, some seven months before the second purchase of equipment, and twenty-one and one-half months before the third purchase, taxpayer had paid "rentals" equal to the entire cost of the equipment. (R. 33-34.) The total amount of the "rentals" paid from the date of the first purchase to the dissolution of the partnership in June, 1947, totaled some \$90,000, or approximately three times the total purchase price. Moreover, taxpayer eventually repurchased the equipment at a cost of over \$18,000. Thus, taxpayer had paid over \$108,000 for equipment originally costing \$30,000. (R. 189.) How then can it seriously be contended that such expenditures are deductible as "ordinary and necessary" business expenses?

Taxpayer has failed to prove even that there was any necessity for financing the equipment through a loan,

much less through the very expensive method of "renting" it from the partnership. Assuming, however, that it had been necessary to borrow money for the purchase of the equipment, taxpayer has likewise failed to sustain its contention that it could not have obtained a loan, as did its stockholders in 1943, and the partnership in 1944 and 1945. Taxpayer sought to show that it would not have qualified for such a loan through the deposition of E. E. Searles, vice-president of the bank where both taxpayer and the partnership banked. (R. 131.) It is firmly established that taxpayer did not apply for such a loan, and hence whether it would or would not have qualified at Searles' bank is clearly beside the point. Assuming, however, that Searles' testimony was material to a determination of the issue presented in this case, it was testimony of an interested witness—an officer of taxpayer's bank—who was making an obvious effort to substantiate taxpayer's contention. The finding of the Tax Court that Searles' testimony "although contradictory, is to the effect that petitioner would have been granted a short-term loan had it made application" (R. 186) is the subject of taxpayer's assignment of error No. 6 (Br. 11). The record, however, is very clear that Searles testified exactly as the Tax Court found. After being confronted with the fact that the bank had approved many short-term loans to taxpayer in years prior to 1941, when "the company never had a very good record" (R. 135); and that it had approved short-term loans to taxpayer in amounts from \$2,000 to \$10,000 between 1941 and 1943 (R. 145-148), and that such loans had been paid by taxpayer (R. 148), Searles qualified his testimony as follows (R. 149):

Q. So when you said you discouraged borrowing by Shaffer Terminals when you were discussing this matter with Mr. Stocking, you meant borrowing on a basis of eighteen months or one year?

A. That is right.

Q. And when you said Shaffer Terminals was not qualified to borrow, say \$9500.00 in September of 1943, you meant borrowing upon a long term?

A. That would be my opinion on it, that is correct.

While it is true that after admitting taxpayer would have qualified for a short-term loan, Searles did continue to maintain that it would not have qualified for a long-term loan, it is manifest that that distinction is without significance where the test here was whether taxpayer would have fared as well as the stockholders and the partnership, who, after all, applied for and received short-term loans. (R. 177.) Certainly there can exist no valid reason for discriminating in favor of the partnership or taxpayer's stockholders, especially when it is realized that the purpose of the loans was to finance the purchase of equipment needed and to be used by taxpayer in its business; that the source of the repayment of the loans was taxpayer's income (R. 165-166); and that at the time of the forming of the partnership taxpayer's cash balance (exclusive of its large accounts receivable) totaled some three times the cash balance of the partnership (R. 107, 172, 174, 175).

We believe taxpayer's assignment of error No. 7 (Br. 11)—that the Tax Court erred in holding that the partnership was a subservient agency from which independence and control had been stripped (R. 190)—has been adequately disposed of by our previous discussion of the control which was retained by taxpayer over the partnership's actions, and the patently limited purpose of the partnership. However, even assuming *arguendo* that taxpayer and the partnership were completely separate entities, as taxpayer contends (Br. 13), that fact alone would not constitute the "rental" payments deductible expenses, since "the Government may not be

required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him." *Higgins v. Smith*, 308 U.S. 473, 477. In this respect the present case is analogous to the *Higgins* case where the question of whether a taxpayer was entitled to deduct as a loss the difference between the cost of certain securities and the sale price at which taxpayer had sold the securities to a corporation wholly owned by taxpayer. There it was clear that an actual corporation existed. Numerous transactions were carried on by it over a period of years. It paid taxes, state and national, franchise and income. But, as the Supreme Court said (p. 476):

* * * the existence of an actual corporation is only one incident necessary to complete an actual sale to it under the revenue act. Title, we shall assume, passed to Innisfail [the corporation] but the taxpayer retained the control. Through the corporate forms he might manipulate as he chose the exercise of shareholder's rights in the various corporations, issuers of the securities, and command the disposition of the securities themselves. There is not enough of substance in such a sale finally to determine a loss.

So here the record clearly supports the Tax Court's conclusion (R. 189) that:

Upon close scrutiny, this entire plan is not, in substance, a sale and lease transaction recognizable for tax purposes * * *.

Certainly apart from the subservience of the partnership to the corporation, on the undisputed facts, the taxpayer can hardly sustain the burden of proving that the expenditures were ordinary and necessary.

Taxpayer's contention that the "Sale and Lease Agreements" should be recognized taxwise because they changed "the flow of economic benefits effected by these

transactions'' (Br. 21) is without merit. Preliminarily, it is submitted that taxpayer's analysis of *Higgins v. Smith, supra*, (Br. 19-20) is not warranted. There the Supreme Court, in discussing *Gregory v. Helvering, supra*, stated (p. 476) :

If, * * * the *Gregory* case is viewed as a precedent for the disregard of a transfer of assets without a business purpose but solely to reduce tax liability, it gives support to the natural conclusion that transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration.

Nowhere in the *Higgins* case is there the slightest intimation that the Supreme Court intended to hold that transactions which *either* vary control or change the flow of economic benefits are not to be disregarded. On the other hand, the crux of the *Higgins* case is in the statement that (p. 477) :

The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham [i.e., without a business purpose] may sustain or disregard the effect of the fiction as best serves the tax statute.

The arrangement here did not achieve the business result claimed for it, namely, to increase the taxpayer's working capital, since the "capital" retained temporarily was immediately disbursed in the form of "rentals" and removed from the possibility of use in the business. And the arrangement was a tax avoidance device without business benefit (other than a tax saving) and without substance, not only because of the absence of business purpose but also because the sale-lease form effected no change in the taxpayer's effective ownership of and control over the equipment.

In any event, as to the so-called "change in the flow of economic benefits", the evidence discloses that in 1943, when the partnership was formed, R. H. Shaffer, the majority stockholder of taxpayer, was still receiving an annual salary of \$12,000, despite his inactivity for two years (R. 120), whereas the other stockholders were active, and, in the words of taxpayer's witness, S. B. Stocking, "working night and day and Sunday" (R. 121). This condition, and the unfairness in compensation which it engendered, could well have accounted for the decision to divide the "rental" payments in a manner which recognized the value of the services rendered as well as the ownership of stock. Be that as it may, the issue here is whether the contested payments qualified under the applicable statute as ordinary and necessary business expenses. In determining such an issue, it is not material that the payments were shared by the stockholders of taxpayer equally or according to some other formula. But where the same people as the sole stockholders of a corporation deal with themselves as the sole members of a partnership, the fact that they agree to share their "take" from the corporation's income in proportions different from their holdings in the corporation does not create a "change in the flow of economic benefits" (Br. 21) which would require their transactions to be recognized for tax purposes. This must have been the conclusion reached by the Court of Appeals for the Fifth Circuit in the *Armston* case, *supra*, where the payments claimed to be "rentals" were made 100% to Mrs. Armston as lessor of the equipment, whereas her interest in the W. M. Armston Company (the lessee) was but 60%.³

³ The fact that the Armstons were husband and wife does not distinguish that case from the case at bar, since, as the Supreme Court said in *Commissioner v. Culbertson*, 337 U.S. 733, 746, the " * * * existence of the family relationship does not create a status which itself determines tax questions."

Certainly, *Brown v. Commissioner*, 180 F. 2d 926 (C.A. 3d), and *Skemp v. Commissioner*, 168 F. 2d 598 (C.A. 7th), do not support taxpayer's contention, as in both of those cases the controlling fact was that there was an arms-length transaction between the lessor and "a new independent owner" (*Brown v. Commissioner, supra*, p. 929) under which transaction the payments were required for the continued use and possession of the property, the seller having completely relinquished control.

In *Commissioner v. Greenspun*, 156 F. 2d 917 (C.A. 5th), upon which taxpayer relies (Br. 20) the court recognized that (p. 920):

* * * while real transactions between a corporation and its sole stockholder may not for the reason alone that the stock is solely owned be disregarded for tax purposes, transactions to be effective for such purposes must have reality, that is must achieve some legitimate business result, must not be mere tax dodging devices without business benefits or substance.

That case, while concerned with the same principle of law which applies here, involved such different facts and circumstances that it cannot be regarded as dispositive of this case. The property there (steel cylinders) had been rented by the corporation from the time of its organization in 1911, until its dissolution in 1941.⁴ In 1918, Greenspun acquired all of the cylinders and sold them to the corporation. In 1919, Greenspun became sole stockholder of the corporation, bought the cylinders back at the same price at which he had sold them in the previous year, and leased them to the corporation for the same rent it had been paying from 1911. In holding that the corporation could deduct as rent in the taxable years 1939-1940, such part of the amounts

⁴ With the exception of about one year in 1918-1919.

paid as constituted a reasonable charge for the use of the cylinders, the court pointed out (p. 921) that the transfer made in 1919 had no tax consequences; that the lease arrangement in the tax year was the same as had been in existence since 1911;⁵ that the unreality lay not in the corporation's lease of the cylinders, but in the 1918 transfer of title to it in the first place; that the transfer back to Greenspun in 1919 merely restored the *status quo*; and that no question had ever previously been raised by anyone that Greenspun (and later a trust created by him) was not the real owner of the cylinders. The court also pointed out that the unreality in attributing the ownership of the cylinders to the corporation was further emphasized by the fact that the Tax Court there had also treated other cylinders, never at any time owned even briefly by the corporation, as in reality the corporation's property, rather than the property of Greenspun who had purchased them from third persons and always thereafter owned them.

The case of *Twin Oaks Co. v. Commissioner*, 183 F. 2d 385 (C.A. 9th), is also vitally distinguishable from the instant case. There taxpayer corporation discontinued its business, and the business was thereafter conducted by a partnership composed of taxpayer's three stockholders (two men and the wife of one) plus another person (the other wife). The corporate entity was retained and the corporation, in consideration of the partnership assuming its accounts payable and giving to the corporation its promissory note, transferred to the partnership all of its assets except the premises on which the business had been and was thereafter to be conducted. The partnership leased that land from the corporation. Each of the four partners contributed additional capital to the partnership. The Commis-

⁵ Except for the one year 1918-1919.

sioner allocated all of the partnership income to the corporation and the Tax Court affirmed. This Court reversed, stating (p. 387) that the conversion from corporate to partnership operation was more than a mere change in form. Such a radical change is far different from the situation here prevailing.

Indeed, the cases relied upon by taxpayer serve merely to emphasize the fact that the tax recognition, to be accorded a sale and leaseback arrangement, must obviously depend in each case upon the facts of that case. The facts in this case require the conclusion that despite the transfer of title the sale-lease arrangement was without substance taxwise.

There remains only taxpayer's assignment No. 4 (Br. 11), that the Tax Court erred in finding as a fact that the cargoes handled by taxpayer, including supplies for the Alcan Highway and Lend-Lease cargo destined for Russia, were handled "under an arrangement with the named Governments, which was expected to and did continue for the duration of the war". (R. 173.) Since that finding was not essential to the Tax Court's decision that the payments are not deductible, there would seem to be little to be gained from a discussion of it. However, it is apparent from Mr. Kennell's testimony (R. 107) that the arrangement was expected to continue for the duration of the war, as long as the Russian supply line was left open, and that the supply line was actually left open for the entire length of the war.

Viewed in the light of the well-recognized principle that deductions are a matter of legislative grace, it is clear that taxpayer has failed to sustain its burden of proving that the "rental" payments were "both ordinary and necessary". *Illinois Agricultural Hold. Co. v. Commissioner*, 131 F. 2d 583, 585 (C.A. 7th).

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

A. F. PRESCOTT,

VIRGINIA H. ADAMS,

Special Assistants to the Attorney General.

OCTOBER, 1951.

No. 12973

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,
Petitioner,
vs.
COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

Reply Brief

HENRY C. PERKINS,
FREDERIC D. METZGER,
Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel.

523 Tacoma Building
Tacoma 2, Washington

FILED

Dammeyer Printing Co.—Tacoma

67-24 (1951)

TABLE OF CASES

	Page
ARMSTON v. COMMISSIONER, 12 Tax Court 539, Affirmed 188 Fed. (2d) 531 (CCA 5).....	10
COMMISSIONER v. CULBERTSON, 337 U.S. 733, 93 L. Ed. 1659	11
COMMISSIONER v. TOWER 327 U.S. 280, 90 L. Ed. 670	11
DOBSON v. COMMISSIONER, 320 U.S. 489, 88 L. Ed. 248.....	5
GRACE BROS. v. COMMISSIONER, 173 Fed. (2d) 170 (CCA 9)	5
LIMERICKS, INC. v. COMMISSIONER, 165 Fed. (2d) 483 (CCA 5).....	5
MOLINE PROPERTIES, INC. v. COMMISSIONER, 319 U.S. 436, 87 L. Ed. 1499.....	12
NATIONAL INVESTORS CORP. v. HOEY, 144 Fed. (2d) 466 (CCA 2).....	12
ROSS v. COMMISSIONER, 129 Fed. (2d) 310 (CCA 5).....	13
TWIN OAKS COMPANY v. COMMISSIONER, 183 Fed. (2d) 385 (CCA 9).....	6, 12

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

Reply Brief

Respondent's argument appears to be;

(1) That rentals paid by Petitioner to the partnership were not deductible as ordinary and necessary expenses under Section 23(a)(1)(A) of the Internal Revenue Code because the transactions between the Petitioner and the partnership were not "in substance what they appear to be in form";

(2) That the transactions between Petitioner and the partnership were sham and unreal, and so to be disregarded for tax purposes because they did not serve “any real business purpose for the taxpayer”, (Respondent’s Brief p. 12); and because they were entered into as a tax avoidance device. (Resp. Brief pp. 8 and 21).

REPLY TO RESPONDENT’S ARGUMENT

The use of Clark fork type Lift Trucks was essential to the Petitioner’s business. The rental paid for the use of such equipment is clearly a deductible expense under I. C. R., Sec. 23(a)(1)(A) and Section 29.33(a)-1 of Treasury Regulations No. 111. The rental paid by Petitioner to the United States Army and others, both before and after the organization of the partnership, was without question allowed as a deductible expense. The amounts of rental so paid and the dates of payments were as follows: (R. 33 & 34)

<u>Dates of Payment</u>	<u>Paid to</u>	
	<u>U.S. Army</u>	<u>All Others</u>
1942	\$ 1,726.50	\$ 3,377.00
1943, Jan. to Sept., incl.....	20,047.50	10,548.75
1943, Oct. to Dec., incl.....	5,646.00	267.00
1944	32,603.25	Nil
1945	15,288.75	Nil

The threat of recapture by the Army of its equipment and the increased demand made on Petitioner by Governmental agencies in the furtherance of the war effort created the paramount necessity that Petitioner obtain the use of additional equipment of that type. Securing the use of additional equipment, therefore, served a business purpose of petitioner.

Had Petitioner been able to obtain such use by renting such equipment from the United States Army or from others than the partnership, the deductibility of the rental paid would be unquestionable. The rental thereof from the partnership involved no change in the Petitioner's method of doing business, and the rent paid therefor was as much an ordinary and necessary expense as the rent paid to others for like equipment.

The case, therefore, turns upon the question whether the transactions between Petitioner and the partnership were "recognizable for tax purposes."

The Tax Court's conclusion that they were not (R. 189) is characterized in Respondent's brief, at page 12, as "this ultimate factual conclusion."¹ On the contrary, it is a conclusion of law upon the decisive issue in the case, and, we repeat, clearly erroneous. That conclusion

¹This characterization is based upon *Limericks, Inc. v. Commissioner*, 165 Fed. (2d) 483 (CCA 5th), which was decided January 23, 1948, before the rule in the Dobson case (*Dobson v. Commissioner*, 320 U.S. 489, 88 L. Ed. 248) was abrogated by the Act of June 25, 1948, c. 646, Sec. 36; 62 Stat. 991. See *Grace Bros. v. Commissioner*, 173 Fed. (2d) 170, at 173 (CCA 9th).

and the argument made in Respondent's brief in support of it are based upon *ex post facto* considerations and disregard controlling factors and principles.

As stated in Petitioner's Opening Brief, at page 7, early in 1943 Petitioner was "confronted by the paramount necessity of obtaining additional equipment." No such equipment was available for rental in the Puget Sound area. New equipment could not be acquired (i. e., purchased) except on priority, which the taxpayer could and did obtain because of its essential war activities. (See Respondent's brief, page 4.)

In the belief that Petitioner could not finance the purchase of such equipment or, at any rate, that it was not good or sound business for it to attempt to do so, and in the exercise of their "legal right to conduct their business affairs through a medium of their own choice" (*Twin Oaks Co. v. Commissioner*, 183 Fed. (2d) 385, at page 387), the stockholders of Petitioner organized the partnership, Equipment Associates, to finance the purchase of this equipment and paid in its initial capital of \$10,000.00 in "cash furnished equally by the partners." Petitioner, as the holder of the required priority, ordered the equipment, and to avoid entanglement in Governmental red tape which might result if it appeared that the supplier of the equipment was paid by someone other than the holder of the priority (actually at the

suggestion of the supplier, though not so shown by the record) Petitioner sent its check in payment of each delivery, but as to the first and second deliveries, at least, its funds were in no way depleted thereby since it received payment from the ~~Petitioner~~ ^{PARTNERSHIP} before its checks were presented for payment. There is nothing in the record to impugn the honesty of the judgment of the officers and stockholders of Petitioner that in the circumstances existing in August and September, 1943, when the Petitioner had a cash balance on August 31, 1943 of \$115.72 only, when the continuance of trans-Pacific lend-lease shipments to Russia was subject to interruption at any time by the Japanese, and when even the outcome of the war with Japan hung in the balance, Petitioner's financial condition and prospects did not justify its borrowing money to purchase such equipment even though such a loan could have been obtained, which they had every reason to believe could not be done.

Respondent labors at length to prove that in the events which happened subsequent to that crucial time in 1943 when the partnership was organized, Petitioner could have financed the purchase of the equipment. From that much-labored foundation of hindsight, it is argued that the transactions were sham and unreal. However, they would have been very real to the partners had the Japanese gained mastery of the Pacific, which possibility was very gravely present in September

1943. In that event, the partnership would have been left with the equipment on its hands but without use therefor and neither income nor much chance of salvage therefrom.

In the course of this labored argument, it is asserted:

“The arrangement here did not achieve the business result claimed for it, namely, to increase the taxpayers’ working capital, since the ‘capital’ retained transitorily was immediately disbursed in the form of ‘rentals’ and removed from the possibility of use in the business.” (Respondent’s brief, p. 21.)

The utter fallaciousness of this statement is self evident. What the transactions between Petitioner and the partnership did was to provide the Petitioner with the use of essential equipment without the investment of a dollar of its capital. On the other hand, the utter unsoundness, from a business and financial standpoint, of the investment by the Petitioner of borrowed capital in equipment is easily demonstrated. From September 1943 through December 1945, Petitioner paid the Partnership as equipment rental a total of \$77,454.78. During that period it was in the 90% tax bracket. If it had purchased the equipment and not paid the rentals, its income would have been increased by the amount of such rentals with the result that its taxes would have been increased \$69,712.00 and it would have been left with but \$7,742.78

to apply on the cost of the equipment or the loans made for the purchase thereof.

Much emphasis is put upon the fact that beginning in 1943, Petitioner's business increased very rapidly (see Resp. Brief 4, 10 and 13) as though that fact demonstrates that Petitioner could have financed the purchase of the additional equipment. Actually, it, with other facts both in the record and of which this Court will take judicial knowledge, proves the contrary. The increase in business inevitably brought increased expenses—for labor, for rental not only of equipment but of terminal facilities, and other current operating expenses—and consequent increased demands upon Petitioner's cash working capital. These latter demands were met, and could only be met, by increased borrowings, which increased from \$15,000.00 on August 31, 1943 to \$52,000 on December 31, 1944 (R. 37). Moreover, Petitioner's earned surplus, to which reference is made in Respondent's brief, p. 7, declined in 1944 from \$83,219.31 at the beginning of the year, to \$67,303.28 at the end of that year. See Income and Excess Profits Tax Return for the year 1944 (R. 39-42). That loss was due to income and excess profits tax of \$54,554.15 for the year 1943, which was paid in 1944 and for which no reserve was set up and which is not taken into account in the summary of Petitioner's working capital position, (Ex. 5, R. 37.) Taking that liability into account, Petitioner's

current assets at the end of 1943 exceeded its current liabilities by only 24,770.24. Such working capital position obviously did not warrant a capital loan for the purchase of capital assets.

At page 14 of Respondent's brief, it is asserted that the present case is indistinguishable from *Armston v. Commissioner*, 12 T.C. 539, affirmed, 188 Fed. (2d) 531 (CCA 5th). With proper deference to the author of that brief, we submit that such assertion is wholly unwarranted. In the *Armston* case, the corporation taxpayer had for years owned its equipment. All of its stock was owned by H. W. Armston and his wife. One and three-sevenths shares were registered in the name of K. W. Kerr, but they were qualifying shares and they were beneficially owned by H. W. Armston (See 12 T.C., p. 541, and cf. Respondent's brief, p. 14). For no reason except to reduce its tax liability, the corporation sold its equipment to Mrs. Armston under an arrangement whereby she leased it back to the corporation at going rentals. "That transaction served no business purpose." "It was merely a device for minimizing tax liability." 188 Fed. (2d) at page 533. The corporation, with no compulsion, business or otherwise, changed its position from that of the owner of equipment required in its business to that of lessee thereof, but with no change in the flow of economic benefits. Armston and his wife continued to receive the profits of the corporation's business,

but in the form of rentals plus dividends and not merely dividends alone. There was “a mere paper reallocation of income among the family members,” “the actualities of their relation to the income did not change.” *Commissioner v. Culbertson*, 337 U.S. 733, at 746, 93 L. Ed. 1659, at 1667, quoting *Commissioner v. Tower*, 327 U.S. 280, at 292.

Respondent places great reliance upon the finding of the Tax Court “that the partnership was organized ‘primarily to *avoid* the excess profits tax and its impact on the earnings of petitioner.’ ” (See Respondent’s brief, pp. 11 and 15.) He does not challenge the proposition that “a taxpayer has the right to decrease its tax liability by any lawful means.”

The Court will take judicial notice that following the reimposition of the excess profits tax by the Excess Profits Tax Amendment of 1941 and the Revenue Act of that year, many corporations converted to partnerships, and with the repeal of that tax reconverted to corporations. Such conversions were in the exercise of a legal right and were not disregarded for tax purposes as sham and unreal because they avoided the excess profits tax liability.

It is to be noted that so far as this is a finding at all, it is a finding as to purpose and motive and a finding of a lawful purpose. Moreover, being a finding as to pur-

pose or motive only, it is wholly immaterial. "Motive to avoid taxation is never relevant." *National Investors Corporation v. Hoey*, 144 Fed. (2d) 466, at 488. See also *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436, 87 L. Ed. 1499.

Respondent does not dispute or in any way challenge the fact that the purpose of the organization of the partnership, Equipment Associates, was both the equivalent of business activity and was followed by the carrying on of business, and on the strength of that principle alone, the transactions between the Petitioner and the partnership cannot be disregarded in determining the incidence of taxation.

Respondent's only answer to the proposition that these transactions cannot be disregarded as sham and unreal because they changed the flow of economic benefits, is to be found on page 22 of Respondent's brief. The contention there made was repudiated by this Court in *Twin Oaks Co. v. Commissioner*, 183 Fed. (2d) 385. See Opinion p. 387.

In the last analysis, Respondent's position seems to be that while it may be true that taxpayers have the legal right "to conduct their business affairs through a medium of their own choice" and the right to avoid tax liability by any lawful means, yet the Government has the right,

by bureaucratic finding, to say that transactions between a corporation and its stockholders are a sham and unreal if they result in a reduction of tax liability, because the Government has the right to say that a corporation and its stockholders must conduct their business only in the way which will produce the greatest amount of taxes.

As was well stated by the Circuit Court of Appeals for the Fifth Circuit, in *Ross v. Commissioner*, 129 Fed. (2d) 310, at 313:

“In tax matters it is only under exceptional circumstances that the separateness of the corporation from the stockholders can be disregarded, even when there is but one stockholder. *Burnet, Commissioner v. Clark*, 287 U.S. 410, 53 S. Ct. 207, 77 L. Ed. 397; *Burnet, Commissioner v. Commonwealth Improvement Co.*, 287 U.S. 415, 53 S. Ct. 198, 77 L. Ed. 399.”

It is submitted that the exceptional circumstances that would warrant the disregard of the transactions between the Petitioner and the partnership are not present in this case.

WHEREFORE, Petitioner renews the prayer of its opening brief.

Respectfully submitted,

HENRY C. PERKINS,
FREDERIC D. METZGER,

Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel.

No. 12973

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

UPON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

PETITION FOR REHEARING

HENRY C. PERKINS,

FREDERIC D. METZGER,

Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,

FILED
Of Counsel.

Office and Post Office Address:
523 Tacoma Building
Tacoma 2, Washington

APR 1 1952

INDEX

	Pages
PETITION FOR REHEARING	3
I. SCOPE OF REVIEW	5
II. NATURE OF THE TRANSACTION	6
III. BUSINESS PURPOSE	12

TABLE OF CASES

	Pages
ARMSTON v. COMMISSIONER, 188 (F.(2d) 531 (CCA 5th)	4, 8, 11, 12
COMMISSIONER v. GREENSPUN, 156 F.(2d) 917 (CCA 5th)	4, 7, 10, 12
GILLETTE'S ESTATE v. COMMISSIONER, 182 F.(2d) 1010, (CCA 9th)	6
GRACE BROS. v. COMMISSIONER, 173 F.(2d) 170 (CCA 9th)	5
TWIN OAKS CO. v. COMMISSIONER, 183 F.(2d) 385 (CCA 9th)	4
WHITE v. FITZGERALD, 193 F.(2d) 398 (CCA 2nd)	4

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

SHAFFER TERMINALS, INC.,	}
<i>Petitioner,</i>	
vs.	
COMMISSIONER OF INTERNAL	}
REVENUE,	
<i>Respondent.</i>	

PETITION FOR REHEARING

Petitioner respectfully petitions this Court for a rehearing of this cause, because of its conviction that the decision is erroneous under the undisputed facts and the law applicable thereto, and because the issue here is such that a rehearing by this Court affords the only real remaining means whereby Petitioner may secure redress from the injustice of the tax liability which will be otherwise imposed upon it.

The grounds upon which Petitioner seeks a rehearing are:

1. This Court adopted the reasoning and tacitly approved findings of the Tax Court which were based wholly upon inference and implication drawn from undisputed testimony and clearly erroneous.

2. This Court erroneously held that the facts of this case bring it within *Armstrong v. Commissioner*, 188 F.(2d) 531 (CCA 5th) and *White v. Fitzgerald*, 193 F.(2d) 398 (CCA 3rd). It is clearly distinguishable therefrom upon its determinative facts, and falls unmistakably within the ruling facts in *Commissioner v. Greenspun*, 156 F.(2d) 917 (CCA 5th), and *Twin Oaks Co. v. Commissioner*, 183 F.(2d) 385 (CCA 9th).

4. The Court erroneously treated the transaction as a "sale and lease-back," when in reality it was only a lease. cf P-H 1952 Tax Service, Vol. 1, Par 12,011 and Par. 12,011-A.

5. The Court failed to recognize the business basis for the transaction and erroneously treated it as a transaction without business purpose, entered into solely for the purpose of evading taxes.

I.

SCOPE OF REVIEW

Because of colloquy between one of the judges and counsel for the Respondent during oral argument, and further because of the nature of the opinion filed by the Court in this cause, we believe that the Court may have misconceived the scope of its proper review of the findings and decision of the Tax Court. Under Internal Revenue Code, Section 1141(a), this Court's jurisdiction to review the decision of the Tax Court is the same as in review of decisions of the District Courts in civil actions tried without a jury. It is governed by Rule 52(a) of the Federal Rules of Civil Procedure. This Court so held in *Grace Bros. v. Commissioner*, 173 F.(2d) 170 (CCA 9th), and in that opinion said:

“It is axiomatic that uncontradicted testimony must be followed. . . . The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved, or with testimony which is inherently improbable.”

Where evidence before the Court is undisputed and the disposition of the case must rest upon inferences or conclusions drawn from such testimony, this Court is as able as the Tax Court to draw the proper infer-

ences and conclusions and is free to do so, within the limits of giving due respect to the Tax Court's expertness in tax matters. *Gillette's Estate v. Commissioner*, 182 F.(2d) 101 (CCA 9th).

The only evidence in this case is that of Petitioner, and the evidence is undisputed. The ultimate question is whether rentals paid by Petitioner for use of equipment to a partnership had a business purpose and were therefore a deductible business expense under IRC Section 23(a)(1)(A), or whether the rental payments were made as a result of a transaction that in its entirety was a sham and indulged in only for the purpose of evading taxes. Since the proper conclusion must necessarily be predicated upon inferences and implications drawn from the undisputed facts, this Court in the exercise of the proper scope of its appellate jurisdiction should review the facts and draw therefrom its own conclusion.

II.

NATURE OF THE TRANSACTION

The answer to the ultimate question in this case may be readily and validly found by determining which of two decisions of the Fifth Circuit more closely fits the facts of this case.

Commissioner v. Greenspun, 156 F.(2d) 917 (CCA 5th), involved the question of the allowance as business expense, to a corporation solely owned by one Greenspun, of rentals or royalties paid to family trusts of the shareholder for the use of cylinders or drums used by the taxpayer in its business of manufacturing and selling carbonic acid gas. Prior to 1917, the cylinders were owned by Greenspun and others, who leased them to the corporation. In 1918 Greenspun acquired the interest of the other parties in the cylinders and sold them to the taxpayer. In 1919, after Greenspun became the sole stockholder, he bought the cylinders back and re-leased them to the corporation. In 1931 Greenspun created family trusts and transferred all of his right and interest in the cylinders to the trusts, which continued to lease them to the taxpayer. The trustee was a subordinate employee of the taxpayer. In the years in question, 1938, 1939 and 1940, taxpayer paid large amounts to the trusts as rent or royalties for use of the cylinders. The Court held that the rentals in reasonable amounts were properly deducted as business expense. As Respondent properly observed in his brief, (Page 24), that Court held the unreality of the transaction lay not in the corporation leasing the cylinders, but in the 1918 transfer of title to it, and that the transfer back to Greenspun in 1919 merely restored the status quo. (See Op. 156 F.(2d) at page 921).

The case of *Armston v. Commissioner*, 188 F.(2d) 531 (CCA 5th), was a case where the taxpayer corporation, which was principally engaged in construction work, owned equipment purchased in the years 1940, 1941 and 1942 and thereafter used in its business. In 1943 it sold a part of this equipment to the wife of its principal shareholder. At the time of the transaction, the corporation had surplus and undivided profits amounting to \$278,371.16, and the sale price of the equipment was \$33,667.36. The Court held that the rentals were properly regarded by the Tax Court as distributions to Mrs. Armston of corporate earnings for the purpose alone of forming the basis for a substantial tax deduction to the corporation, and that it was merely a device for minimizing tax liability, with no legitimate business purpose. The corporation in this sale and lease-back transaction really gave up nothing but the income.

In the instant case, the taxpayer corporation had been for many years prior to the tax years in question engaged in the business of operating marine terminals under lease. With the advent of World War II, in 1942, it became necessary to conform to the established trend in that business of using pallet boards and fork lift trucks in handling cargo. The corporation did not own such equipment, the uncontradicted testimony being that "We had one ancient type fork-lift truck but

had no other equipment of that type." (R. 117). Taxpayer rented lift trucks from the United States Army and others. As of September 30, 1943, the shareholders of Petitioner formed a partnership in which their interests were equal and in very different proportion than their share holdings. The Partnership acquired and rented to the corporation lift trucks costing \$9,529.44. Subsequently it purchased and rented to the corporation additional equipment of this type, the Partnership paying \$10,298.60 for such equipment in March of 1944, and an additional \$10,319.61 in June of 1945. True it is that the corporation was a transitory conduit of title. It applied for the necessary priorities to purchase the equipment, because it could expeditiously obtain them, and payment was made to the vendor by checks of the corporation, but in each instance the Partnership gave its check to the corporation for the purchase price prior to the time the corporation's checks were presented for payment. (R. 23). The reason for this arrangement was fully and validly explained as being due to the greater expedition and certainty of obtaining the equipment in this manner. There is no dispute but that the corporation never owned the equipment while it was used and that the purchases were in actual reality made by the Partnership with funds contributed by the partners or obtained upon the credit of the individual partners and the security of its assets.

It is apparent that this was not a situation where the corporation sold equipment to the partnership and leased it back. Looking at the entire transaction, it was in reality and in substance a purchase by the Partnership of equipment of a type that the corporation never owned but had theretofore leased. The corporation merely continued its established practice of obtaining such equipment for its use by leasing the same. Much is said about the fact that the corporation paid rentals to the partnership for the use of this equipment in the years 1943, 1944 and 1945 in the aggregate amount of \$77,461.78. As the Court of Appeals of the 5th Circuit properly pointed out in *Commissioner v. Greenspun*, 156 F.(2d) 917, this undoubtedly has a bearing upon the question of whether the rental paid was to the full amount a legitimate business expense, but has nothing to do with the question whether reasonable rental was a properly deductible business expense. There is no question raised in this case as to the reasonableness of the rental, and there can be none, because the rental was at the same rate as the Petitioner paid to others for like equipment and was at the rates established by the regulatory authority of the State of Washington. It is of compelling significance that during the same years, 1943, 1944 and 1945, Petitioner paid to the United States Army for the rental of similar equipment the sum of \$73,585.50, and in the years 1943 and 1944 paid

to others than the United States Army for the rental of similar equipment the sum of \$14,192.75. (R. 33, 34).

There is here no question but that the Partnership had a valid existence; that it became the owner of the equipment; that the rentals were paid in due course of business; that the money and credit used by the Partnership was its own and not that of the corporation; that the corporation was used only as a temporary conduit of title in acquiring the equipment and in reality was never the owner thereof so far as tax significance is concerned; and that it never used the equipment during the brief period of days while it acted as a conduit of title.

The underlying basis for the decision in *Armston v. Commissioner, supra*, and other so-called "sale and lease-back" cases, is that the transaction in its entirety constituted only a re-allocation by the corporation of income theretofore enjoyed and which it would have continued to enjoy had not the questioned transaction been entered into. The result reached in that case is predicated upon a finding, properly drawn from the evidence, that there was no business purpose to the corporation in entering into the transaction, and no purpose for it other than to obtain a re-allocation of its income for the purpose of avoiding taxes. There was no re-allocation of income here. Petitioner had not

owned equipment of this type and had never received the income. Had the United States Army and others continued to make such equipment available to Petitioner on a rental basis, Petitioner would have continued to rent from the Army and others at the same rates it paid the Partnership. It was only because the equipment became unavailable on the rental market that Petitioner turned to the Partnership as a means of finding an owner with equipment available to it for rental. The facts bring the case squarely within *Commissioner v. Greenspun* and clearly differentiate it from *Armston v. Commissioner*.

III.

BUSINESS PURPOSE

We are satisfied that the distinction between a lease case, such as *Commissioner v. Greenspun*, and a sale with lease-back case, such as *Armston v. Commissioner*, should be dispositive of this case, because here there is no basis for asserting that the taxpayer re-allocated its income for the purpose of avoiding taxes. But assuming for purpose of argument that this was a sale and lease-back transaction, the rentals are none the less deductible, because here there was a business purpose for the transaction. It should be borne in mind that the

business purpose need not rest upon unquestionably sound business judgment. Suffice it that there was a purpose other than merely to avoid taxes. The distinction is between sham and substance.

Neither the Tax Court nor counsel for Respondent in presenting the case to this Court have fairly interpreted the financial position of Petitioner. The tax returns of Petitioner for the years 1944, 1945 and 1946 are a part of the record. They disclose the following financial results of Petitioner's operations for those years:

1944

Adjusted net income	\$42,362.49 (R. 38, L. 38)
1944 income and excess profits taxes	25,185.99 (R. 60, Sch. M, L. 3)
Net earnings after taxes	<u>\$17,176.50</u>

1945

Adjusted net income	\$28,309.81 (R. 56, L. 38)
1945 income and excess profits taxes	15,237.32 (R. 74, Sch. M, L. 3)
Net profit after income and excess profits taxes	<u>\$13,072.49</u>

1946

Adjusted net income (Deficit)	<u>(\$15,843.62) (R. 70, L. 35)</u>
-------------------------------	-------------------------------------

The profits remaining after taxes for these three years of operation were then as follows:

1944	-----	\$17,176.50
1945	-----	13,072.49
1946	-----	(15,843.62)

Net income after taxes for three-year-period	-----	\$14,405.37
---	-------	-------------

Bearing in mind that the purchase price of the lift trucks bought by the Partnership was in excess of \$30,000.00, it is at once apparent that the earnings of the corporation for the three-year-period would have paid less than half of the purchase price.

As disclosed by the 1944 return, Petitioner's earned surplus and undivided profits at the beginning of the year 1944 were in the amount of \$83,219.31, but its tax liability for 1943 was \$54,554.15, which, when deducted, left a surplus and undivided profit of \$28,665.16.

Earned surplus and undivided profits as of January 1, 1945, were \$67,303.28, but it had a 1944 tax liability of \$25,185.99, leaving earned surplus and undivided profits of \$42,117.29.

As of January 1, 1946, its earned surplus and undivided profits were \$68,922.29, against which it had a

1945 tax liability of \$15,237.32. The earned surplus and undivided profits at the close of 1946 were \$31,836.64.

At the close of 1943, Petitioner was using borrowed capital in the amount of \$32,000.00 (R. 37), and at the close of 1944, it owed the bank \$52,000.00. (R. 37). Its average loans in 1944 were \$36,125.00 (R. 55), and in 1945, \$21,980.00. (R. 69). These loans were, of course, included in Petitioner's liabilities in determining its net worth. They are significant and disclose the extent of the use by Petitioner of the limited credit available to it.

Petitioner's gross receipts in 1944 were \$496,494.16 (R. 38, L. 4), and in 1945, \$391,531.88. (R. 56, L. 4). Since its profit for these years was nominal, it follows that Petitioner was incurring obligations in substantially the amounts of its gross revenues, which averaged more than \$1,350. 00 per day in 1944, and more than \$1,000.00 per day in 1945.

The foregoing figures give substance and meaning to the statement of Mr. Searles, Vice President of The Puget Sound National Bank, that the corporation was not entitled to credit to be used for the purpose of purchasing capital assets such as equipment. Its working capital necessities required the use of its available

credit. They completely negative the significance which the Tax Court attributed to the amount of Petitioner's bank balance on particular dates.

It is undisputed and not subject to question that the officers of Petitioner discussed with Mr. Searles the matter of Petitioner obtaining a loan to buy the equipment; that he discouraged them; and that he would not recommend to his employer a loan to Petitioner for such a purpose, and without his recommendation, such a loan would in all probability be rejected. Aside from the views of Mr. Searles, it was entirely proper for the officers of Petitioner to determine that it was better for Petitioner to continue to rent this type of equipment rather than undertake the burden of acquiring it outright. Its decision to continue to lease had a proper business purpose and background. From this background a conclusion that the only reason for entering into the transaction with the Partnership was to re-allocate its income for the purpose of evading taxes cannot obtain any substantial support.

Respondent would probably challenge the foregoing analysis from the record of Petitioner's financial situation with the confident assertion that the picture would have been entirely different if Petitioner had not paid out \$77,461.78 in rental to the Partnership during the

years 1943, 1944 and 1945. Such an assertion would be wholly fallacious.

Much was said in Respondent's brief and in argument about the ability of taxpayer to have paid for the lift trucks bought by the Partnership rather than paying rentals, since the amount of rentals exceeded the purchase price. This argument is wholly superficial and unrealistic. Had the corporation purchased the equipment and thereby increased its adjusted net income by the amount of rentals paid, the amount of such increased income would have been subject to income and excess profits taxes in excess of 85%. This would have meant that of the total rentals, less than 15%, or less than about \$10,500.00, would have been left to Petitioner to apply on the purchase price of \$30,000.00.

In conclusion, we respectfully submit:

A. That this Court must draw from the undisputed facts its own conclusion as to whether this transaction was a mere sham, engaged in solely for the purpose of evading taxes.

B. That the transaction in reality and in substance was simply a lease transaction between two distinct entities, where the only question could be as to the reasonableness of the amount of rentals paid.

C. That even though this Court take the unrealistic view that it was a sale with lease-back arrangement, there was a business reason established by uncontradicted testimony which gives to the form of the transaction substance and validity.

This petition should be granted, and the case set for reargument, to the end that the issues will be reheard and reconsidered by this Court and the judgment of the Tax Court reversed.

Respectfully submitted,

HENRY C. PERKINS,

FREDERIC D. METZGER,

Attorneys for Petitioner.

METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel.

No. 12975

United States
Court of Appeals
For the Ninth Circuit.

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

400 12 25
JAN 15 1926
RECORDED

No. 12975

United States
Court of Appeals
For the Ninth Circuit.

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit in Opposition to Motion to Remand . . .	21
Affidavit in Support of Motion to Remand	19
Affidavit in Support of Motion Requesting Trial by Jury	24
Answer	15
Appeal:	
Appellant's Designation of Record on	80
Appellant's Statement of the Points on Which She Intends to Rely on	79
Appellee's Designation of Additional Record on	82
Certificate of Clerk to Record on	76
Notice of	60
Appellant's Designation of Record on Appeal . .	80
Appellant's Statement of the Points on Which She Intends to Rely on Appeal	79
Appellee's Designation of Additional Record on Appeal	82
Certificate of Clerk to Record on Appeal	76

INDEX	PAGE
Findings of Fact and Conclusions of Law.....	50
Judgment	54
Memorandum Opinion.....	35
Minute Orders:	
October 10, 1949—Denying Motion Request- ing Trial by Jury.....	26
January 24, 1950—Case Assigned to Judge Erskine for Trial.....	27
January 24, 1950—Trial Continued.....	28
January 25, 1950—Trial Continued.....	29
January 26, 1950—Trial Continued.....	30
January 27, 1950—Case Is Submitted.....	31
February 14, 1950—Case Reopened for Filing of Briefs.....	31
March 6, 1950—Case Stand Submitted.....	33
September 19, 1950—Judgment Be Entered in Favor of the Defendant.....	34
March 19, 1951—Transferring Cases to Judge Roche's Calendar.....	58
March 29, 1951—Motion Stand Submitted..	58
April 20, 1951—Denying Motion for New Trial	59
Motion for New Trial.....	55
Motion Requesting Trial by Jury.....	23

INDEX	PAGE
Motion to Remand.....	18
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	60
Notice of Clerk Dated September 26, 1949.....	56
Notice of Motion for New Trial Dated February 26, 1951.....	23
Notice of Motion for New Trial Dated March 7, 1951.....	57
Notice of Motion to Remand.....	17
Notice of Removal of Action to the District Court	13
Order Denying Motion for New Trial.....	60
Order for Filing Points and Authorities.....	32
Petition for Removal to the District Court.....	3
Complaint	7
Summons	12
Proceedings October 3, 1949.....	61
Proceedings October 10, 1949.....	65
Proceedings January 24, 1950.....	70

NAMES AND ADDRESSES OF ATTORNEYS

JOHNSON, HARMON & HENDERSON,
J. EDWARD JOHNSON,

703 Market St., San Francisco, Calif.

Attorneys for Appellant.

HADSELL, MURMAN & BISHOP,
SYDNEY P. MURMAN,
RICHARD S. BISHOP,

405 Montgomery St., San Francisco, Calif.

Attorneys for Appellee.

In the United States District Court, in and for the
Northern District of California, Southern Division

No. 29078R

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
FIRST DOE, SECOND DOE,

Defendants.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

To the District Court of the United States, for the
Northern District of California, Southern Division

The petition of Corning Glass Works, a corporation, respectfully shows:

I.

An action has been brought in the Superior Court of the State of California, in and for the City and County of San Francisco, between the plaintiff and defendants above named, being action No. 389272 in said court, and said action is now pending in said court and has not been brought to trial therein; that the date of the commencement of said action

was the 4th day of August, 1949; that the date on which this defendant was served with the Summons and Complaint in said action was the 4th day of August, 1949; that to the knowledge of this defendant there is no other defendant who has appeared, or who has been served with Summons and Complaint, or who is a necessary, or proper, party defendant to said action.

II.

That said action is of a civil nature at law and is brought to recover damages for personal injuries, and is one of which the District Courts of the United States are given original jurisdiction.

III.

That the matter, or amount, in dispute in said suit exceeds the sum, or value, of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

That the controversy in said suit is between citizens of different states in that your petitioner, Corning Glass Works, a corporation, was at the time of the commencement of this action, and still is, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and was then, and still is, a resident and citizen of said State of New York and not a resident or citizen of the State of California, whereas the plaintiff was at the time of the commencement of this action, and still is, a resident and citizen of the State of California, and more

particularly a resident and citizen of the City of Berkeley, County of Alameda, State of California.

V.

Your petitioner presents herewith a bond, conditioned and in all respects conforming to the requirements of Section 1446(d) of the United States Code—Judiciary and Judicial Procedure.

VI.

That a copy of the Summons and Complaint which were served on this defendant in said action are annexed hereto; that said Summons and Complaint are the only papers, process, pleadings, or orders, which have been served on this defendant in said action to the date hereof.

Wherefore, petitioner prays that the above-entitled action be removed from the Superior Court of the State of California, in and for the City and County of San Francisco, to the District Court of the United States for the Northern District of California, Southern Division.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant Corning Glass Works, a
Corporation.

State of California,
City and County of San Francisco—ss.

Sydney P. Murman, being duly sworn, deposes and says:

That he is an attorney at law and a member of the law firm of Hadsell, Sweet, Ingalls & Murman, attorneys for the Corning Glass Works, a corporation, defendant in the above-entitled action; that he makes this verification for and on behalf of said defendant for the reason that said defendant is a corporation having its principal place of business in the State of New York and there is no officer, or other person, authorized to make this verification in the City and County of San Francisco, where affiant and said attorneys have their office; that he has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein set forth upon information or belief and, as to those matters, he believes it to be true.

/s/ SYDNEY P. MURMAN.

Subscribed and sworn to before me this 18th day of August, 1949.

[Seal]: /s/ HAZEL E. THOMPSON,
Notary Public, in and for the City and County of
San Francisco, State of California.

In the Superior Court of the State of California
in and for the City and County of San Francisco.

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS , a Corporation,
FIRST DOE, SECOND DOE,
Defendants.

COMPLAINT FOR DAMAGES FOR
PERSONAL INJURIES

The plaintiff complains of the defendants and
for cause of action alleges:

I.

That the defendant Corning Glass Works at all
times mentioned herein was and now is a corpora-
tion organized and existing under and by virtue
of the laws of the State of New York; that defend-
ants First Doe and Second Doe are fictitious names
of defendants whose true names plaintiff is ignor-
ant of and plaintiff prays that when said true
names are known, this complaint may be amended
to allege the same; that at all times herein men-
tioned defendants were and now are doing and
transacting business in the State of California; that
defendants at all times mentioned herein were en-
gaged in the business of manufacturing and selling
a certain brand and type of glass cooking utensils

known generally as Pyrex Ovenware; that said cooking utensils are designed for use by the public in general as dishes for cooking and serving foods generally and were sold by defendants to dealers and stores generally for ultimate sale to the public in general for said uses; that defendants at all times herein mentioned did so distribute and sell its said ovenware to retail stores and dealers throughout the State of California generally.

II.

That on or about the 18th day of December, 1948, the plaintiff purchased a said Pyrex cooking utensil manufactured and sold by defendants for ultimate purchase and use by the public as foresaid to wit, a Pyrex baking dish at a retail dealer of the same; that thereafter and on or about December 23, 1948, plaintiff commenced to wash said dish preparatory to using the same; that while plaintiff was washing said dish, the dish exploded and broke to pieces suddenly without any warning whatsoever, and plaintiff was thereby struck and cut by pieces of said broken dish and received injuries to her said right forearm, as follows, to wit: a deep, slightly oblique transverse laceration of the right forearm, a complete laceration of all the flexor tendons of the wrist, a severance of the radial and ulna arteries and severance of the ulna and median nerves; that by reason of said injuries it was necessary to preform a surgical operation upon plaintiff to tie the radial and ulna arteries, remove the hemostats and attempt repair of the median and ulna nerves, attempt repair of the tensor and the

tendons of the second, third and fifth fingers, and attempt to repair and care for said injuries generally; that since and by reason of said injuries the plaintiff's right hand has been at all times and now is rendered useless and without any function; that by reason of said injuries there is a flexion deformity of the fingers of the said right hand, so that the same are held in a most deformed position at all times; that plaintiff is informed and believes and therefore alleges the fact to be that the said injury to her right arm is permanent and that she will suffer for the rest of her life the lack of use and utility and deformity of her right arm, as aforesaid; that by reason of said injuries plaintiff suffered a severe shock to her nervous system; that by reason of the alleged injuries caused by the explosion and breaking of said dish as herein alleged, the plaintiff has suffered permanent injuries and disfigurement to her arm and to her health in general, and has been caused shock, pain and suffering as aforesaid, and has suffered mortification, embarrassment and humiliation and pain and will so suffer for the rest of her life, all to her damage in the amount of \$100,000.00.

III.

That by reason of said injuries caused by the breaking and exploding of said Pyrex dish as aforesaid it was necessary that plaintiff have medical aid and attention and hospitalization to perform the operation upon her above mentioned, and to otherwise attempt to alleviate her suffering and affect

a cure of her injuries; that by reason of said injuries plaintiff has incurred medical expenses and hospital expenses in the amount of approximately \$1,000.00; that plaintiff is informed and believes and therefore alleges the fact to be that by reason of said injuries it will be necessary to incur additional medical expenses for medical care, nursing and medical treatment of said injuries in addition to those already incurred; that plaintiff does not know the amount of same and plaintiff prays that when the amount of said additional expenses are known to her, that this complaint may be amended to allege the same.

IV.

That the explosion and breaking of said Pyrex dish resulting in the injuries to plaintiff, as aforesaid, was proximately caused by the negligence of the defendants as follows, to wit: That the defendants did negligently and carelessly manufacture and construct said dish which exploded and caused said injuries in an unsafe and unsubstantial manner so that when said dish was delivered to a retail dealer for the ultimate sale to the public in general, and when purchased and used and handled by plaintiff, as aforesaid, it was in such a condition that it constituted an inherently and abnormally dangerous article to those using it normally for the purpose for which it was intended; that it was so negligently constructed that it would, when used for the purpose for which it was intended, explode and break, inflicting injury on those so handling it; that said dish did explode and break while being

handled and used by plaintiff as aforesaid, normally and for the purpose for which it was intended, causing the injury to plaintiff aforementioned; that said dish had not been changed in any respect after it had left the defendants possession prior to its exploding and breaking causing the injury to plaintiff above mentioned.

Wherefore plaintiff prays for judgment against defendants and each of them in the sum of \$101,000.00, plus such medical expenses as may be reasonably required for medical care and attention in the future, for costs of suit and for such other and further relief as to the Court may seem proper in the premises.

/s/ JOHNSON, HARMON &
HENDERSON.

State of California,
City and County of San Francisco—ss.

Lula J. Wilson, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof and that the same is true of her own knowledge except as to those matters which are therein stated upon information and belief and as to those matters that she believes it to be true.

/s/ LULA J. WILSON.

Subscribed and sworn to before me this 3rd day of August, 1949.

[Seal] PROVIDENCE WARNE,
Notary Public in and for the City and County of
San Francisco, State of California.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
FIRST DOE, SECOND DOE,
Defendants.

Action brought in the Superior Court of the State of California in and for the City and County of San Francisco, and the complaint filed in the office of the County Clerk of said City and County.

JOHNSON, HARMON &
HENDERSON,
Attorney for Plaintiff.

SUMMONS

The People of the State of California Send Greeting to:

Corning Glass Works, a corporation, defendant.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above,

brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated Aug. 4, 1949.

[Seal] MARTIN MONGAN,

By D. T. WOOD,
Deputy Clerk.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

NOTICE OF REMOVAL OF ACTION TO THE
DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DIS-
TRICT OF CALIFORNIA, SOUTHERN
DIVISION

To the Plaintiff Above Named and to Messrs. Johnson, Harmon & Henderson, Attorneys for said Plaintiff

You, and Each of You, Will Please Take Notice that, on the 18th day of August, 1949, the defendant, Corning Glass Works, a corporation, did file in the District Court of the United States for the Northern District of California, Southern Division, and in the office of the Clerk thereof, its Petition and bond for the removal of that certain action in the Superior Court of the State of California, in and for the City and County of San Francisco, between the plaintiff and defendants above-named, being action number 389272 in said court, from the said Superior Court of the State of California, in and for the City and County of San Francisco, to the District Court of the United States for the Northern District of California, Southern Division.

Copies of said Petition and bond are herewith served upon you.

Dated this 18th day of August, 1949.

HADSELL, SWEET, INGALLS &
MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant, Corning Glass Works, a
Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CORNING
GLASS WORKS, A CORPORATION

The defendant Corning Glass Works, a corporation, answers plaintiff's complaint as follows:

I.

Defendant admits that at all times herein mentioned it was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, now doing and transacting business in the State of California, and engaged in the business of manufacturing and selling a certain brand and type of glass cooking utensils known generally as Pyrex Ovenware which are distributed and sold throughout the State of California generally.

II.

Except as hereinabove admitted, defendant avers that it has no information or belief as to the allegations of Paragraph I to enable it to answer the allegations therein contained and, placing its denials on that ground, defendant denies each and every part of said allegations.

III.

Answering paragraph II defendant denies generally and specifically the allegation "that while plaintiff was washing said dish, the dish exploded and broke to pieces suddenly without any warning whatsoever, and plaintiff was thereby struck and

cut by pieces of said broken dish"; that as to the remaining portions of said Paragraph II defendant avers that it has no information or belief as to the allegations therein contained to enable it to answer the same and, placing its denials on that ground, defendant denies each and every part of said allegations.

IV.

Answering Paragraph III defendant denies generally and specifically the allegation that plaintiff's injuries were "caused by the breaking and exploding of said Pyrex dish as aforesaid"; that as to the remaining portions of said Paragraph III defendant avers that it has no information or belief as to the allegations therein contained to enable it to answer the same, placing its denials on that ground, defendant denies each and every part of said allegations.

V.

Answering Paragraph IV defendant denies each and every, all and singular, the allegations in said paragraph contained; denies that defendant was careless and negligent, or careless, or negligent, in any respect whatsoever; denies that plaintiff has been damaged in the sum of One Hundred and One Thousand (\$101,000.00) Dollars, or any part thereof, or in any other sum.

And as a Further, Separate and Distinct Answer and Defense, Defendant Alleges:

That the plaintiff, herself, did not exercise ordinary care, caution, or prudence in the premises to avoid said accident and the resulting injuries, if

any, by her sustained, and that said accident and the resulting injuries, if any, complained of, were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff in the premises.

Wherefore, defendant prays to be hence dismissed with its costs of suit incurred herein.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant Corning Glass Works, a corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Defendants and Hadsell, Sweet, Ingalls & Murman, Sydney P. Murman, and Richard S. Bishop, their attorneys:

Notice is hereby given that on the 12th day of September, 1949, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard in the court room of the Honorable Michael J. Roche, Room 338, Post Office Building, 7th and Mission Streets, City and County of San Francisco, plain-

tiff, by her attorneys, Johnson, Harmon & Henderson, will apply for an order remanding the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, from which court it was removed.

There is served herewith upon you a copy of the motion which will be presented to the court at the time aforesaid and a copy of affidavit in support of said motion.

Dated this 29th day of August, 1949.

JOHNSON, HARMON &
HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

MOTION TO REMAND

Now comes plaintiff by her attorneys, Johnson, Harmon & Henderson, and upon the basis of the facts alleged in the accompanying affidavit and the file and record herein moves this court to remand this cause to the Superior Court of the State of California in and for the City and County of San Francisco from which it was attempted to be removed to this court for the reason that the petition

to remove said action to this court was not filed in time.

Dated this 29th day of August, 1949.

JOHNSON, HARMON &
HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
TO REMAND

State of California,
City and County of San Francisco—ss.

J. Edward Johnson, being duly sworn, deposes and says:

That he is one of the attorneys for plaintiff and is conversant with the facts relating to the above-entitled action; that said action was originally filed in the Superior Court of the State of California as action No. 389,272 on the 4th day of August, 1949; that summons was on that day duly issued; that defendant Corning Glass Works was on the 4th day of August, 1949, personally served with summons and a copy of the complaint in the City and County of San Francisco, all in accordance with the law of the State of California; that the time for answering or otherwise pleading in re-

sponse to said complaint and summons expired on August 15, 1949.

That the petition to remove this cause to this court was not filed herein until the 18th day of August, 1949; that a stipulation was entered into between counsel for plaintiff and counsel for defendant on August 15, 1949, in words and figures as follows, to wit:

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, et al.,

Defendant.

STIPULATION EXTENDING TIME

It is hereby stipulated by and between the respective parties hereto that the defendant Corning Glass Works, a corporation may have to and including the 25th day of August, 1949, within which to plead, answer, demur or otherwise move.

This stipulation need not be filed.

Dated August 15th, 1949.

JOHNSON, HARMON &
HENDERSON,

Attorneys for Plaintiff.

That defendant's petition for removal to this court was not filed until August 18, 1949, and that plaintiff's counsel was not served with notice thereof until August 19, 1949.

/s/ J. EDWARD JOHNSON.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ PROVIDENCE WARNE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 26, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO
MOTION TO REMAND

State of California,
City and County of San Francisco—ss.

Richard S. Bishop, being duly sworn, deposes and says:

That he is one of the attorneys for the defendant Corning Glass Works, a corporation, and is familiar with the facts relating to the above-entitled action: that the defendant Corning Glass Works was, personally, served with summons and a copy of the com-

plaint in said action in the City and County of San Francisco, on the 4th day of August, 1949; that the Petition to Remove this cause to this court, together with a bond, in the form required by law, were filed in this court on the 18th day of August, 1949; that on the 18th day of August, 1949, a copy of the said Petition for Removal was filed with the Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, which was the court in which said action was originally filed; that on the 19th day of August, 1949, the attorneys for plaintiff were served with written notice of the filing of said petition and bond, and on the said 19th day of August, 1949, the attorneys for plaintiff were also served with copies of the said petition and bond; that the removal of this action to the above court was therefore completed within the twenty (20) day period allowed by Section 1446 of the New United States Judicial Code.

Wherefore, affiant prays that the plaintiff's Motion to Remand be denied.

/s/ RICHARD S. BISHOP.

Subscribed and Sworn to before me this 6th day of September, 1949.

[Seal] /s/ HAZEL E. THOMPSON.

Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

NOTICE

To Messrs. Johnson, Harmon & Henderson, 1400
Central Tower, 703 Market St., San Francisco 3,
Calif., and

Messrs. Hadsell, Sweet, Ingals & Murman, 614
The San Francisco Bank Bldg., 405 Montgom-
ery St., San Francisco 4, Calif.

You Are Hereby Notified that on Oct. 3, 1949, the
above-entitled case will appear on the Law and Mo-
tion calendar of Judge Michael J. Roche to be set
for trial.

Sept. 26, 1949.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

MOTION REQUESTING TRIAL BY JURY

To defendant, Corning Glass Works, and to its
attorneys, Messrs. Hadsell, Sweet, Ingalls & Mur-
man and Sydney P. Murman and Richard S.
Bishop:

You and Each of You please take notice that at
the time this matter comes on to be set for trial, on
Monday, the 3rd day of October, 1949, at 10 o'clock
a.m., or as soon thereafter as counsel can be heard,
in the above court, at the Courtroom, Post Office
Building, 7th and Mission Streets, San Francisco,

California, the plaintiff will move this court for its order to order a trial by jury in the above matter. Said motion will be made upon affidavit of J. Edward Johnson, filed herein and upon all the records and files in the above matter.

Dated: September 28, 1949.

JOHNSON, HARMON &
HENDERSON,
Attorneys for Plaintiff.

Points and Authorities

Rules 38 and 39, Federal Rules of Civil Procedure. See discussion William Goldman Theatres v. Kirkpatrick, 154 F.(2) 66.

JOHNSON, HARMON &
HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
REQUESTING TRIAL BY JURY

State of California,
City and County of San Francisco—ss.

J. Edward Johnson, being first duly sworn, deposes and says that he is one of the attorneys for

plaintiff in the above matter; that he has had the actual management of this cause from the time the complaint was filed in the Superior Court of the State of California, in and for the City and County of San Francisco.

That it has been the desire and expectation of the plaintiff from the time she first discussed this matter with affiant that this cause should be tried before a jury; that that has been the intention of plaintiff's counsel throughout; that affiant neglected to ask for a jury within the time prescribed by the Federal Rules of Civil Procedure, that is to say, within ten days after the service of the last pleading, which in this case was the answer of the defendant.

That said pleading was served on affiant as plaintiff's attorney on or about August 24, 1949, at which time there was pending before this court a motion to remand this cause to the Superior Court of California, in and for the City and County of San Francisco. That at the time said pleading and answer was filed and served on affiant as said counsel, affiant was of the view that this court would have no alternative but to remand this cause to the state court; that affiant inadvertently followed the rule of said state court which permits a party to request a jury trial when he files a memorandum to set a case for trial, or when the cause is set for trial. That failure to request a jury herein within the time allowed by Rule 38 of the Federal Rules of Civil Procedure was due to the inadvertence and mistake of affiant as plaintiff's counsel. That this action is a cause in damages and one at law, which, as a matter of con-

stitutional law, entitles the parties to a jury trial if they desire it.

Wherefore affiant for and in behalf of and as counsel for plaintiff respectfully requests this court to make an order directing that this cause be tried before a jury, all as authorized by Rule 39 of the Federal Rules of Civil Procedure.

/s/ J. EDWARD JOHNSON.

Subscribed and sworn to before me this 28th day of September, 1949.

[Seal] /s/ PROVIDENCE WARNE,
Notary Public, in and for the City and County of
San Francisco, State of California.

My Commission Expires May 26, 1948.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1949.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco on Monday,

the 10th day of October, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day to be set for trial and for hearing on motion for jury trial. After hearing the arguments of the attorneys, it is Ordered that the motion for jury trial be denied and that trial be set for January 24, 1950.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 24th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

This case came on regularly this day for trial. Ordered that said case be assigned to Judge Herbert W. Erskine for trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 24th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case came on regularly this day for trial before the Court sitting without a jury. Messrs. W. G. Harmon and William H. Henderson appeared for and on behalf of the plaintiff. Sidney P. Murman, Esq., appeared for and on behalf of the defendant. After opening statements by Messrs. Harmon and Murman on behalf of their respective clients, Lula J. Wilson, Herman Winkler, Wm. Curtis, Ernest R. Taylor, Robert L. Wilson, and Henry L. Rhodes were sworn and testified on behalf of the plaintiff. Mr. Harmon introduced in evidence and filed Plaintiff's Exhibits Nos. 1, 3, and 4, and introduced Plaintiff's Exhibit No. 2, which was received and marked for identification only. Mr. Murman introduced Defendant's Exhibit A, which was received and marked for identification only. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 25, 1950, for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 25th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. Arthur Holstein was sworn and testified on behalf of the plaintiff. Thereupon the plaintiff rested. Mr. Murman, on behalf of the defendant, made a motion for judgment of dismissal, ruling upon which motion was Ordered reserved. Mr. Murman introduced in evidence and filed Defendant's Exhibit A which was previously received and marked for identification only, and introduced Defendant's Exhibit B which was received and marked for identification only. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 26, 1950, for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 26th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. The Court Ordered that the motion of defendant for involuntary dismissal be and the same is hereby denied. Henry G. Mankin and Joseph A. Pask were sworn and testified on behalf of the defendant. Mr. Murman read into evidence the deposition of William G. McClellan on behalf of the defendant. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 27, 1950, at 10:00 a.m., for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. Thereupon the defendant rested. Henry L. Rhodes was recalled by the plaintiff for further evidence in rebuttal. Both sides rested. Mr. Murman made a motion for judgment of involuntary dismissal, which motion was Ordered taken under submission. Thereupon the Court Ordered that this case be and the same is hereby submitted.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tues-

day, the 14th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

On the request of counsel for the plaintiff, it is Ordered that this cause be reopened for the filing of briefs and placed on the calendar for March 6, 1950, for submission.

[Title of District Court and Cause.]

ORDER FOR FILING POINTS AND AUTHORITIES

Good Cause Appearing Therefor, It Is Hereby Ordered that the above case is reopened for the submission of points and authorities. The plaintiff may have to and including the 15th day of February, 1950, within which to submit opening memorandum of points and authorities, defendant may have to and including February 20, 1950, within which to submit answering memorandum and plaintiff may have to and including February 24, 1950, within which to file a reply thereto and that the case may be placed on the calendar for resubmission on the 6th day of March, 1950.

Dated: February 14th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed February 14, 1950.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case came on regularly this day for submission. On motion of M. J. Murray, Esq., attorney for defendant, and with the consent of W. G. Harmon, Esq., attorney for plaintiff, it appearing that all briefs have been filed herein, it is Ordered that this case stand submitted.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 19th day of September, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case heretofore having been tried by and submitted to the Court for consideration and decision, now, due consideration having been had, it is Ordered that judgment be entered herein in favor of the defendant and against the plaintiff upon the presentation of findings and judgment by counsel for defendant, in accordance with an opinion this day signed and filed.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 29078

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
FIRST DOE, SECOND DOE,

Defendants.

Erskine, District Judge.

MEMORANDUM OPINION

Statement of Facts

This is an action for damages for personal injuries sustained by plaintiff by reason of the breaking of a Pyrex bowl manufactured by defendant corporation. Jurisdiction in this Court is based upon diversity of citizenship, plaintiff being a resident of California and defendant corporation a resident of New York.

The bowl in question consisted of Pyrex ware, a glass product, designed and manufactured by defendant to withstand considerable temperature. It is commonly known as "ovenware" and is used for baking. The evidence shows that subsequent to its manufacture the bowl was placed in a carton, which was packed in a box containing several separate cartons, and that this box was shipped by train to a jobber in San Francisco. It was purchased by the

jobber F.O.B. New York. Upon reaching its destination the box was unloaded into a truck, and then taken to the jobber's warehouse where it was unloaded. Thereafter, it was reloaded on a truck, delivered to the Emporium-Capwell Company store in Oakland, California, unloaded and put in a store-room. Subsequently the box was opened and the contents placed upon the store shelves for sale. There is no evidence that during these many handlings the bowl or dish did not sustain some shock or bump which might have caused a defect, with the exception of the testimony of a jobber, who often sold this ware to the store, that if a carton box had been damaged in transit it would be inspected by him and any damaged contents removed; the testimony of the person in charge of the department which handled the ware to the same effect; and the testimony of the plaintiff and her husband that they made a visual inspection when they brought the bowl into their home and found no visible defects. Neither the jobber nor the representative of Emporium-Capwell could say anything about this particular piece of Pyrex ware. Their testimony merely went to their method of handling the ware from manufacturer to consumer. The jobber could not say that he was the particular jobber who sold this particular bowl to the store.

The testimony of both the plaintiff's and defendant's experts is that this glass could break from defects such as a scratch, a chip, a crack, or some internal defect resulting from a bump or shock. The supervisor of the testing department of the defend-

ant testified that a deep scratch might not affect the durability of a dish, whereas a slight scratch might cause it to break. If this be so, it is in the realm of possibility that in the casual visible inspection made by plaintiff and her husband of the dish after they brought it home they may have overlooked some apparently slight defect, which subsequently caused the break. When they received the dish from the store it was wrapped. They bought it from a sample and did not examine it until they reached home.

The plaintiff claims that as she was holding the bowl in her left hand wiping the inside of it with her right hand it exploded with a loud crashing noise. She then noticed that her right wrist had been severely cut. At the time of the mishap she was standing by the sink near the tile drains on the side thereof, which were approximately three feet from the floor. According to the police officer who visited the scene shortly after the accident, several fragments of glass were on the drainboard and in the sink, together with some powdered glass and two or three small fragments on the floor two or three feet from the sink. All these fragments he collected and placed in a box or container of some sort. Plaintiff's husband testified that later he found some small fragments under the stove, back of the radio to the left of the left drainboard, and under the dining room rug, near the door to the kitchen, which was a small room approximately eight by ten feet. These fragments were also placed by plaintiff's husband with the other fragments

and subsequently thrown away. They were never seen or examined by any of the experts in the case, and the defendant had no opportunity to examine them. Thus the reason for the breaking is left to speculation and expert testimony.

Plaintiff also claimed she received a slight cut or abrasion upon her face from a small fragment of glass. There is no doubt she had such a cut or abrasion.

Plaintiff's expert, assuming that there were no externally caused defects, and that the breaking occurred because of internal strain caused by faulty or inadequate annealing, testified that faulty annealed glass will shatter with a crackling sound. Defendant's experts testified that annealed glass may break but it will not shatter; that tempered glass shatters, but annealed glass does not; that if glass shatters, it shatters into small pieces only, and not into large as well as small fragments; and that if the accident occurred as plaintiff claims it did, it was due to a surface defect and not to a strain caused by faulty annealing. They further testified that in their experience Pyrex ware had never exploded as plaintiff claims.

Legal Conclusions

Plaintiff's counsel contends that under the doctrine of *res ipsa loquitur* she is entitled to recover because she has shown that the breaking occurred through faulty annealing, and that defendant has failed to show proper care upon its part in the manufacture and inspection of its product.

As a primary consideration for this doctrine to be applicable to a case of this kind, all other causes than defendant's negligence must be excluded. In other words, that doctrine can only be applied where the nature of the accident not only supports the inference of defendant's negligence, but excludes all others.

Hubert v. Aztec Brewing Co.,
26 Cal. App. (2d) 664, 688.

It is sometimes said that this doctrine does not apply if the particular product involved in reaching the consumer from the manufacturer has passed through other hands.

Gerber v. Faber,
54 Cal. App. (2d) 674.

This statement may or may not go too far, but it is clear that the burden of proof to show careful handling and to exclude any inference of any other cause or causes is upon the plaintiff. *Zentz v. Coca Cola*, 92 A.C.A. 140. It is difficult to find that plaintiff has sustained this burden of proof. In the many handlings of this article from manufacturer to consumer there is no evidence of how carefully it was done. There is no evidence that the article did not in such transit receive a bump, shock or slight crack or scratch, which weakened it and subsequently led to the breaking. The plaintiff says she saw no defect in it when she first looked at it after she had purchased it, and brought it home, but as heretofore pointed out, she, without experience, may have overlooked any such defect. It is not an

uncommon experience to have a cup, saucer or glass, which appears perfectly sound, break in one's hands. At what particular moment the weakness or defect appeared is purely a matter of conjecture.

It may be argued that the bowl "exploded" and that this indicates clearly that the defect occurred in manufacturing. The weight of the evidence is that annealed glass does not explode or shatter. It shows that tempered glass shatters into small fragments, but that annealed glass does not. The physical evidence here shows this bowl broke into large and small fragments, which is not a shattering or disintegration. Assuming the small fragments were widely scattered, as plaintiff's husband says, and that one of them struck her in the face, this is not inconsistent with the fact that what really happened was that when the bowl broke in plaintiff's hand the part which she did not have in her grasp fell into the sink and upon the tiled drain, causing it to break in large and small fragments and scattering the fragments, particularly the smaller ones, some distance from the place where the glass struck the sink or tile, as is usual with any glass article broken by such a fall. In fact, if this were what happened, as the tile drain was only a short distance from plaintiff's face, it is within the range of possibility that one of these fragments may have been hurled upward and thus struck, plaintiff's face.

The foregoing considerations, and several others, indicate, in my opinion, that the evidence does not exclude every reasonable inference that the break-

ing was due to causes other than a defect in the manufacturing of the article.

But, even if it be assumed that there was a defect in the Pyrex bowl at the time it left the hands of the defendant at the factory, and that it was this defect which caused the injury suffered by plaintiff, a defect in manufacture does not necessarily mean negligence either in manufacture or in inspection of the finished article by the manufacturer. This Court is still faced with the question of whether the defendant was in fact negligent either in the manufacture of the article or in its failure to discover the defect through a reasonable inspection.

It is the contention of plaintiff that the doctrine of *res ipsa loquitur* is applicable in this case, and that under this doctrine the evidence presented by plaintiff requires a finding by this Court of negligence on the part of defendant. Defendant, on the other hand, contends that it was not negligent, since the process of manufacture and the method of inspection carried out at the factory was reasonable under the circumstances.

At the outset it should be noted that, contrary to plaintiff's contentions, this Court, in denying the defendant's motion for a nonsuit, did not rule that this was a proper case for the doctrine of *res ipsa loquitur*. That ruling merely determined that plaintiff had introduced sufficient evidence of the accident and of various means of inspection by which the defect in manufacture, if one existed, might have been discovered, so as to allow the Court to draw an inference, for purposes of that motion, that there

was a *prima facie* case of negligence. The net result of that ruling was to place the defendant under a burden of going ahead with evidence to negate this permissible inference of negligence.

At the present stage of the case the duty of this Court is equivalent to that of a jury—to make a finding of fact as to whether defendant was negligent. In effect plaintiff asks the Court to rule that the doctrine of *res ipsa loquitur* applied to this case requires a verdict of negligence, or at the very least that the doctrine results in shifting the burden of proving lack of negligence over to defendant. It is my opinion that neither of these conclusions are required by the law or the facts, although it must be admitted there is some disagreement as to the exact effect of the *res ipsa loquitur* doctrine in California.

See Prosser, *Res Ipsa Loquitur in California*,
37 Cal. Law Rev. 183, 218.

As pointed out by Dean Prosser in this article—"a *res ipsa loquitur* case is merely one kind of circumstantial evidence case. The Latin tag adds nothing to the proof which would exist without it. Such proof cannot be reduced to a formula or a rule, and its strength, weight and force will depend always on the inference reasonable men may draw from the particular facts. A *res ipsa loquitur* case may be strong, or it may be weak. There is no typical case and there is no more reason to expect that two cases will be alike than in other cases of circumstantial evidence." Prosser, *ibid.* p. 232. In other words, each case must be examined on its own merits. De-

cisions should depend not upon the label that might be attached to a particular situation, but upon the specific facts or circumstances of the specific case.

When we examine the facts of the instant case, we are confronted with a further difficulty which negates any otherwise controlling effect of the *res ipsa loquitur* doctrine. It is generally agreed that a *res ipsa* case arises only where "there is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not ordinarily occur unless someone has been negligent." Prosser, *ibid.* p. 233. I am very doubtful that there is any common experience or any evidence introduced in this case that this type of accident is one that ordinarily occurs only if someone was negligent. The distinction between this case and those generally cited, e. g. the toe in the chewing tobacco and the vagrant steamroller, seems clear. The only evidence presented was that the alleged defect could probably have been discovered through the use of a polariscope. To conclude therefrom, without further evidence or common experience, that since this defect was discovered, it would not have occurred unless the defendant were negligent, would be to convert the defendant manufacturer into an insurer, and to decide the case by means of a grammatical syllogism rather than on the basis of the evidence presented.

The cases relied upon by plaintiff do not support such an extreme position. The case of *Hoenig v. Central Stamping Co.*, 6 N. E. (2d) 415, involved

an appeal from a judgment of the trial court in favor of plaintiff. Such a judgment could be overturned only if it were held that the defendant was entitled to a directed verdict or a dismissal of the complaint. The dissenting opinion, on appeal, thought he was so entitled as a matter of law. The majority opinion, however, held that the plaintiff had presented a case sufficient to go to the jury. In the instant case, this Court has already decided this issue in favor of plaintiff. However, the determination of such an issue is of no help in deciding the factual question of whether defendant was negligent as a matter of fact. The Hoenig case would support a judgment for the plaintiff, but does not require it.

The same issue was before the court in *McClellan v. Acme Brewing Co.*, 92 A.C.A. 814, i.e. whether the plaintiff was entitled to have the case go to the trier of fact. Such issue is not before the court at this time.

Dierman v. Providence Hospital, 31 C. (2d) 290, is an extreme situation, and offers little guide to this Court. Although the exact basis for the decision is somewhat confusing and the quotation from the case of *Bourquignon v. Peninsular Ry. Co.*, 41 Cal. App. 689, 694, seems unfortunately broad, the result is sound, based upon the proposition that the original inference of negligence from the fact of the explosion is treated as compelling in the absence of sufficient rebutting evidence. In that case the defendant failed to introduce evidence showing care on the part of defendant in handling the equipment

or inspecting it before the accident occurred, or thereafter, to determine the cause of the accident.

In short, we are still left with the factual problem of determining whether or not the defendant was negligent under the circumstances of this case. Statements by other courts as to how and why they have applied the *res ipsa loquitur* doctrine in other cases offer pitfalls rather than shortcuts.

There can be no quarrel with the general proposition that if the defective condition was reasonably certain to put life and limb in peril and could have been disclosed by reasonable inspection and tests, it is negligence to omit such tests. *O'Rourke v. Day and Night Water Heater Co.*, 31 C.A. (2d) 364; *Sheward v. Virtue*, 20 C. (2d) 410. In other words, the duty of care requires an inspection in such a situation. The plaintiff here contends that reasonable and adequate are synonymous in such a case, and that if the inspection does not disclose the defect it is necessarily unreasonable. Such is not the law. What is reasonable is determined by weighing the magnitude of the risk of harm against the utility of the actor's conduct. No man can be expected to guard against events which are not reasonably to be expected or are so unlikely that the risk would commonly be disregarded. "The idea of risk necessarily involves a recognizable danger, based upon knowledge of the facts and a reasonable belief that harm may follow . . . The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the

event.' " Prosser on Torts 220. In short, it is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of commission or omission as might within the domain of probability cause some such injury as that complained of. In other words, the danger of injury must be reasonably foreseeable. *Pittsburgh SS. Co. v. Palo*, 64 F. (2d) 198. The cases cited by the plaintiff are in accord.

In the light of these fundamental tort rules can it be said that defendant's failure to inspect with a polariscope every piece of Pydex ware produced in its factory was negligence on its part? If plaintiff had introduced evidence of a past history of accidents or of numerous complaints by customers of shattering or exploding of defendant's ware we would have a different situation. If such were the case, it would be reasonable to hold that defendant was on notice of a risk requiring far greater care in inspection than was its practice; failure to inspect each article by means of a polariscope under such circumstances might well be considered negligence. No such evidence or proof was introduced by plaintiff, although if such were the case it could certainly have been discovered through the discovery processes available to plaintiff.

In the light of the evidence in this case it cannot be said that the common experience of the manufacturer and others in this line of business forms a basis for an inference that if there were a defect it was reasonably certain to put life or limb in peril, or that the accident is of the kind that does not occur

unless some one is negligent. These bowls were produced at the rate of twenty-five pieces per minute. The jobber who testified stated that he alone handled fifteen to twenty carloads of this commodity a year, and there were other jobbers beside him who supplied the Emporium-Capwell Company with these goods. There is no evidence in the record that the breaking of this ware ever hurt or injured any one before. None of its ingredients has any explosive properties. While glass is brittle and will break it is regarded as inherently non-dangerous. The piece involved in this case was simply an open bowl which even if defective and susceptible of breaking would not ordinarily in the nature of things injure or hurt the person handling it.

The question of reasonable care is to be examined in the light of all these considerations. If this article were one which was to be filled with charged water or other liquid, or if it were a chair which if it broke might cause an injury, the degree of care constituting reasonable care involved in the manufacture thereof would, of course, be greater, because a defect in either bottle or chair would be reasonably certain to cause serious harm.

Since, under the circumstances of this case, there was not such reasonable certainty, and since it was shown that during the course of the manufacture of this kind of ware at defendant's plant specimens of each batch were given a thermal test, an abrasion test, a dropping test, a polariscope, and several similar inspection tests, and that such manufacturing was done under a controlled process, so that

these tests would speak for all the ware in the batch so tested, to hold defendant liable in this case would be tantamount in my opinion to making a manufacturer an insurer of his product.

To support her claim of failure to use reasonable care on the part of defendant, plaintiff finally relies upon the case of *Smith v. Peerless Glass Co.*, 181 N. E. 576, contending that the court therein held that inspecting only one out of each 480 bottles under the polariscope constitutes negligence. Plaintiff has misconstrued the holding of the *Peerless Glass* case. In its opinion in that case, the appellate court agreed that the following facts were present: (181 N. E. 576, 578).

1. The defendant-manufacturer knew that soda water bottles sometimes explode.

2. The manufacturer knew that the bottles would be apt to explode if striated (having little ridges on the surface of the glass).

3. The manufacturer tested 6 bottles out of each batch of 2880 by polariscope to check the annealing process. In the words of the court "Defendant was not called upon to subject each bottle to the infallible polariscopic examination. Under the evidence that seems to have been impracticable."

4. Defendant admitted no specific examination was made to detect striation, whereas the customary test was to put bottles first in hot water and then in cold.

Under that set of facts, judgment for the plaintiff

was upheld. The distinction between those facts and the situation confronting the Court in this action seem obvious.

The Court did not base its decision upon a theory that polariscopic inspection of one out of every 480 bottles constituted negligence. On the contrary, it followed the lower Court's finding and held that the inspection of every bottle in this manner was not practicable. However, it held that the lower Court was correct in its finding of negligence because it was shown that the defendant was aware soda water bottles would explode if striated, that the particular bottle involved was striated, and this bottle should have been given the thermal test which would have detected the weakness.

For the foregoing reasons I have decided that plaintiff is not entitled to recover, and that judgment should be for defendant and against plaintiff. Such a judgment will be entered upon defendant preparing and submitting to me the requisite findings and judgment.

Dated: September 19th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on January 24, 25, 26 and 27, 1950, W. Glenn Harmon, Esq., and William H. Henderson, Esq., of Johnson, Harmon and Henderson appearing as counsel for plaintiff, and Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the defendant Corning Glass Works, said cause being tried by the Court sitting without a jury upon plaintiff's complaint and the answer of defendant Corning Glass Works.

Thereupon witnesses were called by the respective parties, and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. The briefs having been filed, said cause was duly ordered submitted for decision and judgment.

Wherefore, by reason of the premises, and having duly considered the law and the evidence, and having made and filed its opinion in said cause, the Court now makes the following:

Findings of Fact

1. At all times mentioned in said complaint the plaintiff was a citizen and resident of Berkeley, California.

2. At all times mentioned in said complaint defendant Corning Glass Works was a corporation organized and existing under and by virtue of the laws of the State of New York, doing and transacting business in the State of California, and engaged in the business of manufacturing and selling a certain brand and type of glass cooking utensils, known generally as Pyrex Ware, which are distributed and sold throughout the State of California, generally; that said glass cooking utensils were designed for use by the public in general as dishes for cooking and serving foods generally, and were sold by defendant F.O.B. Corning, New York, to dealers and jobbers for ultimate resale by stores to the public for said uses.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

4. On December 18, 1948, plaintiff purchased from a local store certain Pyrex Ovenware, more particularly described as a Pyrex baking dish, which had been manufactured by defendant Corning Glass Works. Thereafter, on December 23, 1948, plaintiff washed said baking dish, and, while holding it in her left hand and wiping it with her right hand, the dish broke and fell to the floor, on the drainboard, and into the sink, breaking into numerous large as well as small fragments.

5. Plaintiff sustained an abrasion on her face, a deep laceration on her right forearm which severed the radial and ulna arteries and the ulna and median nerves. A necessary surgical operation was per-

formed. Plaintiff received an injury which is permanent and which has impaired the full use of her right wrist and arm.

6. The evidence failed to support plaintiff's allegation that Corning Glass Works was negligent and careless in the manufacture and construction of said baking dish.

7. The methods of inspection and manufacture of said baking dish by defendant Corning Glass Works were reasonable and proper under the circumstances shown by the evidence.

8. The breaking of said baking dish, as aforesaid, was not proximately caused by any negligence on the part of defendant Corning Glass Works in the manufacture and construction of said baking dish, or otherwise.

9. Prior to and at the time said baking dish was being washed by plaintiff, it was not an inherently and abnormally dangerous article.

10. Plaintiff failed to prove that said baking dish had not changed in any respect after it left the possession of defendant Corning Glass Works at its factory in Corning, New York, and prior to said baking dish breaking while being washed by plaintiff in Berkeley, California, as aforesaid.

From the foregoing findings of fact, the Court makes the following:

Conclusions of Law

1. Plaintiff is not entitled to recover damages from defendant Corning Glass Works, and shall

have and recover nothing from said defendant Corning Glass Works.

2. Plaintiff is not entitled to recover costs of suit herein.

3. Plaintiff is not entitled to any relief in the premises.

4. Plaintiff's complaint is dismissed.

5. Defendant Corning Glass Works is entitled to recover costs of suit herein from plaintiff.

Let an appropriate judgment be entered upon these findings of fact and conclusions of law.

Dated this 6th day of November, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed November 6, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 29078

LULU J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, et al.,
Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on January 24, 25, 26 and 27, 1950, W. Glenn Harmon, Esq., and William H. Henderson, Esq., of Johnson, Harmon and Henderson appearing as counsel for plaintiff, and Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the defendant Corning Glass Works, said cause being tried by the Court sitting without a jury upon plaintiff's complaint and the answer of defendant Corning Glass Works.

Thereupon witnesses were called by the respective parties, and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. The briefs having been filed, said cause was duly

ordered submitted for decision thereafter rendered on September 19, 1950.

Now, Therefore, by virtue of the law, and by reason of the findings of fact and conclusions of law heretofore made and filed by the above-entitled Court on November 6, 1950, It Is Ordered, Adjudged and Decreed that plaintiff shall have and recover nothing from defendant.

It Is Further Ordered, Adjudged and Decreed that plaintiff's complaint is dismissed with costs of suit to defendant taxed in the sum of \$123.57.

Dated this 15th day of November, 1950.

/s/ HERBERT W. ERSKINE,
Judge of the United States
District Court.

Receipt of copy acknowledged.

Lodged November 9, 1950.

[Endorsed]: Filed November 15, 1950.

Entered in Civil Docket Nov. 16, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the court for a new trial in the above-entitled matter on the following grounds, to wit:

1. Error by the court in denying plaintiff's Motion Requesting Trial by Jury and thus depriving plaintiff of her right to a jury trial in the above

cause guaranteed by Amendment VII to the United States Constitution.

2. Discovery by the plaintiff of newly discovered evidence.

The above motion will be based upon all the papers and files in the above-entitled action and all the evidence on the trial thereof, and ground 2 thereof will be, in addition, based upon the affidavits of Virginia Loney and W. Glenn Harmon, filed herewith.

Dated: November 16, 1950.

JOHNSON, HARMON &
HENDERSON,
Attorneys for Plaintiff.

Notice of Motion

To Hadsell, Sweet, Ingalls & Murman, attorneys
for defendant.

[Endorsed]: Filed November 17, 1950.

[Title of District Court and Cause.]

NOTICE

To Messrs. Johnson, Harmon, Stirrat & Henderson,
703 Market Street, San Francisco 3, California.

Sidney P. Murman, Esq., 405 Montgomery
Street, San Francisco 4, California.

You Are Hereby Notified that on February 26,

1951, Judge Herbert W. Erskine Ordered that, due to his illness, this case now on the calendar March 8, 1951, for hearing on Plaintiff's Motion for New Trial be and the same is hereby continued to March 22, 1951, for hearing.

February 26, 1951.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE

To Messrs Johnson, Harmon, Stirrat & Henderson, 703 Market Street, San Francisco 3, California.

Sidney P. Murman, Esquire, 405 Montgomery Street, San Francisco 4, California.

You Are Hereby Notified that on March 7, 1951, Judge Herbert W. Erskine Ordered, upon stipulation of counsel, that this case now on the calendar March 22, 1951, for argument on Plaintiff's Motion for New Trial be continued to March 29, 1951, for argument on said motion.

San Francisco, California. March 7, 1951.

C. W. CALBREATH,
Clerk, U. S. District Court.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 19th day of March, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day for hearing on motion for new trial. It is Ordered that all cases, except submitted cases, on Judge Herbert W. Erskine's calendar be transferred to Judge Roche's calendar on the respective dates.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 29th day of March, in the year

of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day for hearing on motion for new trial; William H. Henderson, Esq., appearing for and on behalf of the plaintiff and moving party, and Sidney Murman, Esq., appearing for and on behalf of the defendant. After arguments by respective counsel, it is Ordered that said motion stand submitted.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 20th day of April, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case having come on regularly this day for hearing on motion for new trial, and the same having been argued and submitted to the Court for consideration and decision, and now being duly considered, it is Ordered that said motion be and the same is hereby denied, as per the order this day signed and filed.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

The plaintiff's motion for a new trial of the above-entitled cause having been heretofore submitted and being now fully considered upon all the files and record in said cause, it is by the Court

Ordered that said motion for a new trial be and the same hereby is denied.

Dated: April 20th, 1951.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff Lula J. Wilson hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 16, 1950, and from the order after final judgment entered April 20, 1951, denying plaintiff's motion for new trial.

Dated: May 4, 1951.

JOHNSON, HARMON &
ENDERSON,

By /s/ ROBERT H. JOHNSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

In the Southern Division of the United States District Court for the Northern District of California

No. 29708

LULU J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
Defendant.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Monday, October 3, 1949

Appearances:

For the Plaintiff:

JOHNSON, HARMON & HENDERSON,
By J. EDWARD JOHNSON, ESQ.

For the Defendant:

HADSELL, SWEET, INGALLS &
MURMAN, by
RICHARD S. BISHOP, ESQ.

The Clerk: Wilson v. Corning Glass Works.

Mr. Bishop: Ready for the defendant.

Mr. Johnson: Ready for the plaintiff, Your Honor.

In this matter plaintiff neglected to ask for a jury. It is a case that is entitled to a jury and

the request was made. An affidavit has been filed showing it was inadvertence and mistake that the jury was not demanded in accordance with the rules, and we now ask the Court to exercise its discretion to allow a jury in this case. It is a pure law case for damages where a jury would ordinarily lie as a matter of right if it had been asked for in time. We refer to Rule 39 giving the Court this discretion.

Mr. Bishop: Your Honor, I represent the defendant. We feel that the right to trial by jury has been waived in this action by failure to file it within ten days after the answer was filed.

We feel that it would be better to try this case before the Court for this reason: The action is against the Corning Glass Works, manufacturers of Pyrex ovenware, and the plaintiff claims that a baking ware manufactured by this defendant shattered or exploded in her hands and brings an action for personal injury. There will be much technical testimony as to the mode of manufacture and also as to the properties of this type of glass, and we feel that this type of action can better be decided by the Court.

In addition to that, I have a memorandum here citing a case which holds that ignorance of the provisions of the Federal Rules applicable to this type of situation is not excusable neglect or inadvertence such as would entitle the plaintiff to have this motion for a jury trial granted at this time. The affidavit of the plaintiff states that plaintiff's attorney was ignorant or not advised of the rule

applicable. We feel that under this case no excusable neglect or inadvertence has been proved.

Mr. Johnson: I want to correct counsel. There is no statement of ignorance or not being advised; it is merely an inadvertence.

This case started in the State Courts and steps were taken to bring it here. A motion to remand it was made, and while that motion was pending an answer was filed. It was assumed by all of us in our office that it would go back to the other court and in connection with all that, the thing got overlooked and slipped by, not that we were ignorant of the rule or not advised.

Mr. Bishop: I have a case here, your Honor, in which the plaintiff sought to move for a jury trial simply on the ground that he was not familiar with the relevant provision of the new rules. I think that this case would govern the situation we have here. The Court said that——

The Court: Is this a Supreme Court citation?

Mr. Bishop: No, it is not, your Honor; it is the District Court in Connecticut. I do not claim it is binding on this Court, but I think it would have some indication of the attitude that would be proper for the Court to take on this motion.

Mr. Johnson: On the affidavit and under the cases and taking all the circumstances into consideration, they hold that inadvertence or mistake is a ground for allowing a jury trial. We have cited a case that uses that language, expresses that. If this was a complicated case that may be involved principles of equity or an accounting or something that

would be complicated for the jury, that would be a different case; but it is a pure law case; there are no contradictions in it.

The Court: We have a peculiar situation here. We have to consider the practicality of these things. We have been promised two additional judges here and they seem to be slow in coming—some political difficulties, as I understand it. That is entirely rumor, however. But if this case waits for a jury trial, you will have to wait for some time, gentlemen.

Mr. Johnson: The plaintiff expects it, and in justice to her we would have to wait them.

Mr. Bishop: We would prefer to have the Court try it, which would not consume as much time; it would dispose of the matter more expeditiously.

The Court: I was thinking that myself; but I don't recall of any case that has been presented to me, if they were acting in good faith, in which I have denied them a jury trial. However, I wouldn't want to establish that as a precedent; but it does seem to me that under the circumstances here, if either or both of you are anxious to go to trial, how you could be accommodated to call a jury in and add to our work. I don't feel justified in doing it.

Mr. Bishop: That would be in accordance with the wishes of the defendant, your Honor. We would prefer to have the case tried by the Court.

Mr. Johnson: Well, that would be an injustice to the plaintiff. She expects a jury and we have advised her of the fact it would be a jury case. So we would not be representing the plaintiff properly

if we did not present this motion to your Honor fully.

The Court: I haven't had an opportunity to check the cases. At times I disappoint everybody because I do not get legalistic enough.

I will check the cases. I will put it over a week. I will give you a final determination one week from today.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

PROCEEDINGS ON MOTION FOR JURY
TRIAL

October 10, 1949

For the Plaintiff:

J. Edward Johnson, Esq.

For the Defendants:

Richard Bishop, Esq.

The Clerk: Wilson vs. Corning Glass Works.
Motion for jury trial.

Mr. Johnson: Your Honor heard our discussion a week ago. Since then counsel for the defendants, who are opposing the request for jury trial, filed an additional memorandum of points and authorities citing the case of Krussman vs. Omaha Woodman Life Insurance Company from an Idaho Court, and we have answered that, taking the view that it is not in point at all. In that case no affidavit was filed at all to show any extenuating circumstances and the Court dismissed because there was

no record and there was no showing. It had not been asked for in time, and under those circumstances was not within the rules. We filed an answer in which we cited the case of Hargreaves vs. Roxy Theater, Inc., a New York Federal Court case, which we think is very much in point. We think the facts are very much like our own. They are, as in our case, the last filings of the pleadings, was in August, as in our case, and there also in September the motion was made, which is our case also, and it was a case for damages. The Court in part said:

“The fact that Rule 6 (B) (2) permits the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect, further indicates that in the adoption and promulgation of the new rules, the Supreme Court intended that the rigid provisions of Rule 38 (B) might be relaxed upon a proper showing, in the discretion of the Court, and it appears to be the intent and the practice to construe the provisions of the rules to render substantial justice. Civil actions to recover damages for alleged negligence are invariably tried by the Court to a jury.”

There, as in our case, it is a question of whether glass was negligently manufactured causing injury to the plaintiff. The Court goes on to say:

“It does not appear that the defendant has suffered, or will suffer any prejudice or the loss of any substantive right and the Court should

not be too prone to deprive a litigant of a trial by jury because of an error or omission on the part of the agent of her attorney to whom she has entrusted her case; where the act or omission is excusable."

In that case the attorney told somebody to have it set and he discovered that that had not been done. In our case the mix-up came up in starting out in the State Court and then coming over here on a motion to remand, and it got overlooked. That is set out in the affidavit.

Mr. Bishop: Your Honor, the case on which counsel relies I believe is clearly distinguishable from the situation that we have here. The case on which counsel relies is a case in which the attorney for the plaintiff instructed someone in his office to prepare and handle the making of a demand for jury trial, and whoever was told in the office to do that, neglected to do so, and the Court felt that the client and the attorney should not be penalized for the neglect of someone in the office where they had been told by the attorney to do so. In the present case we do not think we have any neglect that can be called excusable. I never heard a clear statement of just what the reason for the plaintiff's failure to file this jury demand was, but I assume they simply neglected to do it or just overlooked it. The case I cited, the Krussman case, is closer to it in our point of view than the case which the plaintiff's attorney has cited. In that case, which is cited in my memorandum on file there was no affidavit filed. Plaintiff simply filed a motion for a jury trial, stating in his

motion that the reason for not making a demand for a jury trial was simply the matter had been overlooked. So that reason was before the Court. I think in the present case, since the affidavit on file has shown no excusable neglect, the Court has before it the same situation, the same position as in the Krussman case, on which I am relying. In other words, we had the neglect of the plaintiff's counsel and we have nothing more. We have nothing to show that it is excusable neglect. There is a very short paragraph which I will read to the Court from the Krussman vs. Omaha Woodman Life Insurance case. It says this:

“The Courts who have interpreted the rule where the discretion was exercised and motion for trial by jury was granted after the time to demand it had elapsed seem to be based upon a showing made disclosing some circumstances other than the bare oversight of counsel.”

In our case we claim there is nothing here except the bare oversight of counsel. No circumstances are shown which make that oversight excusable. We feel that there is no point in having these rules if the attorney simply, when he has not followed the rule, can come into Court and get the Court to decide that he can have a jury anyway. We believe it tends to encourage laxity among the counsel if they know they do not have to follow these rules, that they can simply come into Court and ask for relief. The reason we are opposing this motion is we feel it would be much better if this case were tried before the Court. There are going to be a lot

of technical questions as to the properties of this Pyrex glass. There is going to be testimony as to the manner of its manufacture. We feel it would be difficult for a jury to understand those things. We think a Judge would be in a better position to evaluate such testimony and decide whether or not the defendant was really negligent. For that reason we urge the plaintiff's motion to be denied and the case be tried by the Court rather than by a jury.

Mr. Johnson: We submit, your Honor, counsel has submitted nothing to show that the other side has been prejudiced in any manner whatsoever by this oversight and neglect on the part of plaintiff. There is no affidavit countermanding the affidavit on record, and there is no showing that any substantive right has been affected or will be affected. We submit this is a clear case where the Court should exercise its discretion to allow the jury trial.

The Court: Is the matter submitted?

Mr. Johnson: Yes, your Honor.

The Court: The motion will have to be denied on the record. Now, do you want to set it down for trial?

Mr. Johnson: Yes, your Honor.

Mr. Bishop: Yes, your Honor. We were discussing the matter and we both agreed a date around the middle of January would be satisfactory to both sides.

Mr. Johnson: Somewhere along the middle of the month.

The Court: The 24th of January.

[Endorsed]: Filed December 13, 1950.

PROCEEDINGS

Tuesday, January 24, 1950

Appearances :

For the Plaintiffs:

W. G. HARMON, ESQ., and

W. H. HENDERSON, ESQ.

For the Defendants:

SIDNEY P. MURMAN, ESQ.

The Clerk: Wilson versus Corning Glass Works,
for trial.

Mr. Harmon: Ready.

Mr. Murman: Ready.

The Court: In the case of Wilson against Corning Glass Works, if you gentlemen will wait here a little while, we may have a court available this morning: If not, it will be tomorrow at the latest. Just wait for a little bit.

(Several other matters were called, then the following occurred in the instant case.)

The Court: In the case of Wilson against the Corning Glass Works, counsel are here?

Mr. Murman: Yes, your Honor.

The Court: If counsel and witnesses will go to Judge Erskine's court, across the hall, he will try the case.

(Counsel and witnesses thereupon left the courtroom.)

Proceedings had before Honorable Herbert W. Erskine, Judge of the Federal Court, commencing

at the hour of 10:00 o'clock a.m. Appearances as shown on Page 70 of this transcript.

The Clerk: Wilson vs. Corning Glass Works, for trial.

Mr. Harmon: Ready.

Mr. Murman: If the Court please, I have subpoenaed some records from the Herrick Memorial Hospital. The Custodian is here and the records, I think, should be marked for identification. You don't wish any testimony from the custodian, do you?

Mr. Harmon: Not exactly.

Mr. Murman: She is in a hurry to get back to the hospital.

The Court: All right.

Mr. Murman: These are the records you have produced on our subpoena?

The Custodian: Yes.

Mr. Murman: I will ask these records referring to Lula Wilson, produced on subpoena by Herrick Memorial Hospital custodian, be marked Defendant's Exhibit "A" for identification.

The Custodian: May I have a stipulation they will be returned?

Mr. Murman: I think the clerk will give you a receipt.

The Clerk: You can pick them up from the clerk's office, Room 355.

(Thereupon, records referred to were marked Defendant's Exhibit "A," for identification.)

Mr. Harmon: If the Court please, I will make

an opening statement at this time. This is an action for personal injuries against the manufacturer, your Honor, of a piece of Pyrex baking ware which shattered or exploded in the hands of the plaintiff in use in her household.

The plaintiff, Mrs. Lula J. Wilson, is a married woman, a schoolteacher; and about the 18th of December, 1948, I think it was, she went to the Emporium here in San Francisco with her husband, and there purchased a piece of Pyrex baking ware, a dish designed to bake food in an oven. It was taken home by her and put away for a few days, and then the evening before the accident happened it was washed by her and filled with some food—I think it was prunes—and put in the icebox overnight.

Next morning it was taken out of the icebox and some of the prunes were emptied out, and placed back in the refrigerator. Later on in the day it was again taken out of the refrigerator and the prunes were emptied out and the dish left on the sink to await washing and putting away.

The plaintiff finished her lunch, and then the few dishes that she had were piled in the sink and she proceeded to wash these dishes.

The next to the last piece was the lid of this Pyrex bowl, which was a pie plate lid, which was washed and put away; and the next she picked up the dish part of the dish itself and held it in her left-hand. It had been full of water. To begin with it was cold water, and as she washed the dishes the running water from the tap, it wasn't extremely hot, however, but comfortable to the hand.

She proceeded to wipe this dish with her right hand with a wet cloth from the water, and it then exploded or shattered with a noise, and she felt something warm on her face, thought her face was cut. First thing she discovered her right hand was cut and badly bleeding, the blood just gushing out. The dish was exploded into many pieces.

She couldn't stop the blood flow. She got the help of a neighbor and in due time they got an ambulance and she was taken to the hospital. Her hand was almost cut off. It severed both the main tendons and the main artery in her hand. She has been horribly mutilated in that hand and its use rendered very much less than what it would be ordinarily.

She seeks to recover damages for her pain and suffering and for the permanent injury which she has suffered, upon the theory of *res ipsa loquitor*, against the manufacturer of that glass dish.

We will show in our evidence here that the dish was manufactured by the defendant, Corning Glass Works, and that its condition had not been—that it hadn't been subjected to extraneous, harmful effects since it left the factory; and that it exploded while it was being carefully handled in a normal home use for the purpose for which it was designed; and that she has suffered very severely in pain and suffering, and still is subject to pain, and her hand is by no means fully recovered.

We shall ask for damages in the sum of \$100,000.00, plus the special damages.

Certain facts are admitted in the pleadings. The defendant's corporate existence is admitted, and the

fact that it is the manufacturer of Pyrex ovenware designed for household use; and that it is engaged in the manufacture of this brand of Pyrex ware, cooking utensils, here in the State of California. It is distributed generally here.

That in brief, your Honor, are the facts upon which we will ask for a judgment against the defendants in this case.

Mr. Murman: I will make a brief statement for your Honor.

All the allegations of the complaint which allege the explosion of the dish and the negligent manufacture of the dish so that it would be caused to explode are denied, of course, by the defendant. The defendant admits that it is a corporation, doing business in California, engaged in the business of manufacturing and selling clear cooking utensils known generally as Pyrex ware, sold and distributed generally throughout California.

Now, your Honor, we expect the evidence to show that this dish could not have exploded. Counsel apparently, in the allegations alleged in the complaint and in his present statement, is endeavoring to bring the case within the so-called "exploding bottle" cases, of which there have been a great many, particularly as to Coca Cola. However, in all of those cases there is still a requirement, which I understand plaintiff says she will prove, that it must be shown from the time that the manufacturer relinquished possession nothing occurred between that time and the time that the accident occurred to

in any way change the condition of the particular utensil or article up to the claimed exploding.

That is a burden the plaintiff has. The defendant does not have the burden of not showing that, even under the exploding bottle cases. The only place where the *res ipsa loquitor* rule has applied in the exploding bottle cases is in a case where the plaintiff has shown that from the time the article left the manufacturer's possession and until the accident occurred, nothing occurred in the interim to change its condition in any way.

In other words, there must be proof of safe handling, and no showing of bumping or dropping which of course, as they claim, would change its condition.

Our position briefly, then, is that we are not responsible for what the complaint alleges occurred; that it is physically impossible for a piece of glass to explode; that there is no evidence that the glass was properly handled between the time it left the possession of the defendant at Corning, New York, and the time the Emporium sold it to the plaintiff in San Francisco here; that the defendant relinquished possession in New York. There was an FOB sale in New York, and it had no further possession of it after it left Corning at any time or at all.

We will ask your Honor, if the facts are as we understand them to be, that the plaintiff's complaint be dismissed with costs as to the defendant.

The Court: Proceed.

Mr. Harmon: Mrs. Wilson, will you come forward and take the stand?

(Thereupon, the plaintiff, Lula J. Wilson, was sworn and testimony was adduced.)

[Endorsed] Filed June 12, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties:

Petition for removal.

Copy of complaint for damages for personal injuries.

Copy of summons.

Notice of removal.

Answer of defendant Corning Glass Works.

Motion to remand.

Notice of motion to remand.

Affidavit in support of motion to remand.

Affidavit in opposition to motion to remand.

Copy of notice that case will appear on calendar to be set for trial.

Motion requesting trial by jury.

Affidavit in support of motion requesting trial by jury.

Minute order of October 10, 1949.

Minute order of January 24, 1950, (Judge Goodman).

Minute order of January 24, 1950, (Judge Erskine).

Minute order of January 25, 1950.

Minute order of January 26, 1950.

Minute order of January 27, 1950.

Minute order of February 14, 1950.

Order for filing points and authorities.

Minute order of March 6, 1950.

Minute order of September 19, 1950.

Memorandum opinion.

Findings of fact and conclusions of law.

Judgment.

Motion for new trial.

Copy of notice of continuance of hearing motion for new trial, (February 26, 1951).

Copy of notice of continuance of hearing motion for new trial, (March 7, 1951).

Minutes of March 19, 1951.

Minutes of March 29, 1951.

Minutes of April 20, 1951.

Order denying motion for new trial.

Notice of appeal.

Appellant's statement of the points on which she intends to rely on appeal.

Cost bond on appeal.

Designation of record on appeal, (Appellant's).

Designation of additional record on appeal, (Appellee's).

Order Extending time to docket record on appeal.

Reporter's transcript, (October 3, 1949).

Reporter's transcript, (October 10, 1949).

Reporter's transcript, (January 24, 1950).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 14th day of June, 1951.

C. W. CALBREATH,

Clerk,

[Seal] By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12975. United States Court of Appeals for the Ninth Circuit. Lula J. Wilson, Appellant, vs. Corning Glass Works, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 14, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12975

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS, a Corporation,
Appellee.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH SHE INTENDS TO
RELY ON APPEAL

Comes Now the appellant in the above matter and presents her statement of the points on which she intends to rely on appeal as follows, to wit:

1. The court abused its discretion in denying to appellant a jury trial.

2. The court erred denying a jury trial to appellant under Rule 38 (d) of the Federal Rules of Civil Procedure and in refusing relief pursuant to Rule 39 (b). In so far as said Rule (d) is applied so as to deny a jury trial to a litigant otherwise entitled as a matter of right to a jury merely through inadvertence or oversight for a short period of time, and not by consciously waiving said right or waiving said right by failing to claim it for such long period of time that the court and adversary are misled to their prejudice, said rule so applied to such facts is contrary to the Seventh Article of Amendment to the United States Constitution.

3. The court in denying plaintiff a jury trial violated the Seventh Amendment to the United States Constitution.

4. The court erred in refusing to grant a jury trial to appellant upon her motion for new trial.

Dated: June 18, 1951.

JOHNSON, HARMON &
HENDERSON,

By /s/ JOHNSON, HARMON &
HENDERSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 19, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Comes Now the appellant in the above matter and designates the record which is material to the consideration of the appeal as follows, to wit:

1. The pleadings of the parties.
2. Notice of Removal of Action to the District Court of the United States for the Northern District of California, Southern Division.
3. Motion to Remand.
4. Notice of Motion to Remand.
5. Affidavit in Opposition to Motion to Remand.

6. Motion Requesting Trial by Jury.
 7. Notice of Motion Requesting Trial by Jury.
 8. Affidavit in Support of Motion Requesting Trial by Jury.
 9. Minute Order of October 10, 1949, denying Motion Requesting Trial by Jury.
 10. Findings of Fact and Conclusions of Law.
 11. Judgment.
 12. Motion for New Trial.
 13. Minute Order of April 20, 1951, Denying Motion for New Trial.
 14. Notice of Appeal.
 15. Designation of Record on Appeal.
 16. Appellant's Statement of the Points on Which She Intends to Rely on Appeal.
- Also certificate to record.

Dated: June 18, 1951.

JOHNSON, HARMON &
HENDERSON,

By /s/ ROBERT H. JOHNSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 19, 1951.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF
ADDITIONAL RECORD ON APPEAL

Appellee hereby designates the additional record as material to the consideration of the appeal in the above-entitled action as follows:

1. Complaint.
2. Petition for Removal.
3. Affidavit in Support of Motion to Remand.
4. Answer.
5. Clerk's Notice of September 26, 1949, stating matter to be set for trial on October 3, 1949.
6. Transcript of oral proceedings before Judge Michael J. Roche on October 3, 1949.
7. Transcript of oral proceedings before Judge Michael J. Roche on October 10, 1949.
8. Transcript of oral proceedings before Presiding Judge on January 24, 1950, together with the Clerk's minutes.
9. Transcript of oral proceedings before Judge Herbert W. Erskine concerning preliminary matters and up to the testimony of the first witness to be called on January 24, 1950.
10. Clerk's minutes and minute orders for January 24-27, 1950, inclusive.
11. Order of Judge Herbert W. Erskine dated February 14, 1950.
12. Clerk's minutes and minute order of March 6, 1950.
13. Clerk's minutes and minute order of September 19, 1950.

14. Opinion of Judge Herbert W. Erskine dated September 19, 1950.

15. Clerk's notice as to hearing of motion for new trial dated February 26, 1951.

16. Clerk's notice as to hearing of motion for new trial dated March 7, 1951.

17. Clerk's minutes and minute order assigning hearing of motion for new trial to Judge Michael J. Roche, dated on or about March 19, 1951.

18. Clerk's minutes and minute order of March 24, 1951.

19. Designation of additional record on appeal filed in District Court.

20. This designation.

Dated: June 28, 1951.

HADSELL, MURMAN &
BISHOP,

/s/ SYDNEY P. MURMAN,
Attorneys for Appellee.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 2, 1951.

No. 12,975

IN THE

United States Court of Appeals
For the Ninth Circuit

LULA J. WILSON,

Appellant,

VS.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLANT'S OPENING BRIEF.

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

ROBERT H. JOHNSON,

703 Market Street, San Francisco 3, California.

Attorneys for Appellant.

FILED
JUN 16 1952
PAUL F. CROSBY



Subject Index

	Page
Statement of pleading and facts disclosing basis of jurisdiction of the United States Court of Appeals.....	1
Statement of the case	2
Specification of errors	4
Argument	5
A. Summary of argument	5
B. The Honorable District Court abused its discretion in denying appellant a jury trial	6
C. Application of Rule 38(d) of the F.R.C.P. to deny a jury trial to a party in a common law civil action because of inadvertence and oversight but without conscious, intentional waiver or prejudice to the court or adverse party violates the Seventh Amendment to the United States Constitution.....	11
(1) Insofar as Rule 38(d) purports to define a "waiver" of trial by jury lacking intentional and voluntary relinquishment of the right, it is contrary to the Seventh Amendment	11
(2) Federal decisions considering the "waiver" provision of Rule 38 in removal cases.....	17
(3) The purported "waiver" defined by Rule 38(d) is a misnomer as it lacks the recognized factors essential to constitute a waiver	20
(4) Appellant did not waive her right to jury by appearance at the trial after denial of her motion for jury	23
(5) The District Court erred in denying appellant's motion for jury trial	24
D. The District Court erred in denying appellant's motion for a new trial	25

Table of Authorities Cited

Cases	Pages
Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 81 L. ed. 1177..	15
Armond v. Chicago B. & Q. R. Co., 7 F.R.D. 678	19
Baltimore & C. Line v. Redman, 295 U.S. 654, 79 L. ed. 1636	15
Baylis v. Travelers' Ins. Co., 113 U.S. 316, 28 L. ed. 989..	13
Container Co. v. Carpenter Container Corp., 9 F.R.D. 261..	18, 19
Dimick v. Scheidt, 293 U.S. 474, 79 L. ed. 603.....	15
Duignan v. U. S., 274 U.S. 195, 71 L. ed. 996.....	12, 23
Ferris v. Farnsworth Television & Radio Corp., 8 F.R.D. 489	18, 19
Foch Estates, Inc. v. McDonald, 1 F.R.D. 506.....	19
Gasoline Products Company, Inc. v. Champlin Refining Co., 283 U.S. 494, 75 L. ed. 1188	14
Glasser v. United States, 1942, 315 U.S. 60, 86 L. ed. 680	22
Gruskin v. New York Life Ins. Co., 1 F.R.D. 22.....	19
Hardy v. North Butte Mining Co., 22 F. (2d) 62.....	23, 24
Hodges v. Easton, 106 U.S. 408, 27 L. ed. 169.....	13, 15, 20
Johnson v. Zerbst, 304 U.S. 456, 82 L. ed. 1461.....	21
Kearney v. Case, 79 U.S. 275, 20 L. ed. 395	12
Kelley v. Milan, 21 F. 842, affirmed 127 U.S. 139, 32 L. ed. 77	9, 12
Kelsey v. Forsyth, 21 How. 85, 16 L. ed. 32.....	12
Michener v. Johnston, C.C.A. 9th, 144 F. (2d) 171.....	21
Munkacsy v. Warner Bros. Pictures, Inc., 2 F.R.D. 380....	19
Pacific States Corporation v. Hall, 166 F. (2d) 668.....	20
Paper Stylists, Inc. v. Fitchbury Paper Co., 9 F.R.D. 4....	18
Plack v. Baumer, 1 F.R.D. 136.....	19
Slocum v. New York L. Ins. Co., 222 U.S. 364, 57 L. ed. 879	22
Smith v. Weeks, 53 Fed. 758.....	12
Sofarelli Bros. v. Elgin, C.C.A. 4th, 129 F. (2d) 785.....	18

TABLE OF AUTHORITIES CITED

iii

	Pages
Walker v. New Mexico and S. P. R. Co., 165 U.S. 593, 41 L. ed. 837	14, 17
Wardrep v. New York Life Ins. Co., 1 F.R.D. 175.....	19

Constitutions

United States Constitution, Seventh Amendment.....	4, 6, 11
--	----------

Statutes

Code of Civil Procedure, Section 631	9
28 U.S.C.A., Sections 1291 and 1294(1)	2
28 U.S.C.A., Section 1292	24
28 U.S.C.A., Section 1332(a)(1)	2
28 U.S.C.A., Section 2072	5, 9, 12, 15, 16
28 U.S.C.A., Section 2072, par. 4	16

Rules

Federal Rules of Civil Procedure:

Rule 38	5, 6, 8, 9, 10, 17
Rule 38(a)	6, 11, 15, 16
Rule 38(b)	5, 16, 17, 18, 19, 20
Rule 38(c)	17
Rule 38(d)	5, 6, 10, 11, 16, 19, 20, 24, 25
Rule 39(b)	5, 6, 10, 11, 16, 17, 18, 23

Notes on Advisory Committee on Rules following Rule 38

in 28 U.S.C.A. Rules 17 to 51, page 353	16
---	----



No. 12,975

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLANT'S OPENING BRIEF.

**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
BASIS OF JURISDICTION OF THE UNITED STATES
COURT OF APPEALS.**

The action was originally filed by appellant August 4, 1949, in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr. 4.) On August 18, 1949, appellee filed its petition for removal to the United States District Court for the Northern District of California, Southern Division. (Tr. 14.) Appellant filed her notice of motion to remand the cause to the state court August 30, 1949 (Tr. 17), and affidavit in opposition to this motion was filed by appellee September 7, 1949 (Tr. 22), whereupon the motion to remand was dropped without hearing. The basis for removal by appellee

was diversity of residence of the parties, appellee being incorporated under the laws of the State of New York and appellant being a resident of the State of California. (Tr. 4.)

The action is a simple tort action wherein appellant seeks \$101,000.00 damages for personal injuries caused by the sudden breakage of a glass dish alleged to be negligently manufactured by appellee. (Tr. 7-11.)

The basis of the jurisdiction in the United States District Court is found in 28 U.S.C.A. Section 1332(a)(1); the basis of jurisdiction in the United States Court of Appeals is found in 28 U.S.C.A. Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

Appellant brought action against appellee in the state court on August 4, 1949, and served appellee with summons and complaint the same day. No answer was filed within the ten days allowed by state law, but plaintiff by stipulation extended defendant's time to plead. (Tr. 20.) Four days after time to answer would have expired but for the stipulation, defendant on August 18 petitioned for removal to the United States District Court. (Tr. 18.) Plaintiff countered with a motion in the federal court to remand filed August 30. (Tr. 18.) Opposition to this motion was filed by defendant on September 7 (Tr. 22), and plaintiff's motion to remand was dropped without hearing.

The answer was served and filed in the United States District Court August 25, 1949 (Tr. 17), and the ten days' time permitted by the federal rules for demanding a jury expired September 4, 1949. This was before defendant filed its opposition to plaintiff's motion to remand to the state courts. On September 26, 1949, the Clerk in the District Court gave notice that the matter was to be set for trial on October 3, 1949. (Tr. 23.) On September 28 plaintiff filed her motion requesting trial by jury, noticing the same for October 3, 1949, at which time the matter was to be set for trial, and basing said motion upon the affidavit of J. Edward Johnson. (Tr. 24.) No counter-affidavit was filed by appellee.

The motion for trial by jury was heard orally by Judge Michael J. Roche on October 3, 1949 (Tr. 61-65), and was continued to October 10, 1949, at which time further argument was heard, the motion was denied, and the matter set for hearing without a jury. (Tr. 65-69.)

The cause was heard by the late Judge Herbert W. Erskine January 24 to 27, 1950, and final judgment for defendant entered November 16, 1950. (Tr. 55.) Judge Erskine thereafter died and motion for new trial was denied by Judge Michael Roche on April 20, 1951. (Tr. 60.) Notice of appeal was filed May 4, 1951. (Tr. 60.)

Plaintiff's cause of action was for serious injuries to her right forearm and wrist, severing certain arteries, tendons and nerves and causing permanent deformity and injury from which she still suffers.

(Tr. 8-9.) The injury was caused by the explosion of a new pyrex dish which appellant alleges was negligently manufactured by defendant. (Tr. 10-11.) No equitable issues whatsoever are involved.

This appeal is directed solely to the point that plaintiff was deprived of a trial before a jury, to which she is entitled under the laws of the United States. Basically her position is two-fold:

(1) That the honorable trial court abused its discretion in denying her a jury under the circumstances of this case, and

(2) That if the Federal Rules of Civil Procedure permit the trial judge to deny a jury to plaintiff under the undisputed facts of the instant case, then such rules are contrary to the Seventh Amendment of the United States Constitution.

SPECIFICATION OF ERRORS.

Appellant hereby specifies the following errors upon which she relies in the appeal herein:

1. The trial court abused its discretion and erred in denying to appellant a jury trial for damages for injuries caused by alleged negligence of defendant in manufacturing a pyrex glass dish, there being no equitable issues involved. Appellant's inadvertent delay in demanding a jury was of short duration and without any intention to waive her constitutional right to a jury trial. There was no prejudice to the court or to the adverse party by the short delay. The court

therefore abused its discretion in denying appellant's pre-trial motion for relief pursuant to Rule 39(b), Federal Rules of Civil Procedure.

2. The trial court erred in applying Rule 38, Federal Rules of Civil Procedure so as to deny to appellant a jury trial. If Rule 38, subdivisions (b) and (d) permits a trial judge to deny a party a jury trial under the facts of the instant case, then said subdivisions are repugnant to the Seventh Amendment to the Constitution of the United States, and to the limitations in the Act of Congress whereby the rules were authorized. (28 U.S.C.A. Sec. 2072.)

3. The trial court erred in denying appellant's motion for new trial herein upon the grounds stated in specifications of error numbered 1 and 2 supra.

ARGUMENT.

A. SUMMARY OF ARGUMENT.

In the argument we will discuss in subdivision B the questions of abuse of discretion by the trial court in denying to appellant a jury trial; and in subdivision C the constitutional question regarding the validity of the federal rules as applied to the facts of this case so as to deprive appellant of the right to a jury to hear her claim for damages for personal injuries, the action being clearly legal in nature and no equitable issues being involved.

We will contend in subdivision B that the court in failing to give relief under Rule 39(b) abused its

discretion. Rule 39(b) has no purpose other than to insure justice for litigants who unfortunately fail to comply with the strict requirements of Rule 38. The instant case is typical of those for which Rule 39(b) was framed in order to carry out the policy enunciated by Rule 38(a).

In subdivision C we will discuss the question of constitutionality of Rule 38 if it be interpreted to authorize the deprivation of a jury to plaintiff in an action historically at law with no true waiver (as opposed to the so-called "waiver" defined by Rule 38(d)) on the part of appellant of her right to jury. Plaintiff submits that when there is no actual, intentional waiver by words or conduct and no prejudice to the court or adverse party, the application of a rule fixing an *artificial* "waiver" so as to deprive a litigant of the right to a jury is a violation both of the spirit and the letter of the Seventh Amendment.

B. THE HONORABLE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT A JURY TRIAL.

The facts pertinent to the ruling of the trial court denying plaintiff's motion for a trial by jury are contained in the affidavit of J. Edward Johnson (Tr. 24) and are unchallenged. Defendant filed no answering affidavit. Briefly these facts are:

Plaintiff brought a common law action for damages in the proper state court, it being her desire and expectation from the first time she discussed the matter with counsel that the case should be tried before a

jury as provided by constitutional law. Affiant, at that time the attorney having actual management of the cause, inadvertently neglected to ask for a jury within the time allowed by the Federal Rules of Civil Procedure, he then being of the view that the federal court would have no alternative but to remand to the state court, and he thereby inadvertently had in mind the rule of the state court permitting a party to request a jury trial when filing the memorandum to set for trial or when the cause is set for trial.

Corroborating and supplementing the affidavit, the record shows that the complaint was filed in the state court August 4, 1949 (Tr. 3-4), was admitted to be an action of civil nature at law (Par. II, defendant's petition for removal, Tr. 4), and was removed by defendant to the federal court August 18, 1949 (Tr. 14) by which date time to answer would have expired had not plaintiff extended time by stipulation (Tr. 20); that defendant's answer was filed August 25, 1949, the last day of the extension granted defendant by plaintiff (Tr. 17); that plaintiff thereafter moved to remand the cause to the state court (Tr. 18); that defendant filed opposition to plaintiff's motion to remand on September 7, 1949, after plaintiff's time to demand jury under the federal rules had already expired (Tr. 22); and that nothing transpired in the action for 3½ weeks thereafter until plaintiff filed her motion requesting jury trial September 28, 1949 (Tr. 23-24) except that the clerk of the district court gave notice two days earlier that the cause would come on for setting October 3, 1949. (Tr. 23.)

Plaintiff submits that of importance on the question of abuse of discretion is the fact that this is a removal case, the complaint having been filed by appellant in the proper state court, and the cause being removed *by the defendant* to the federal court. Remand proceedings were still pending when the time to demand jury under Rule 38 F.R.C.P. expired. Nothing further was done by either party until appellant moved for a jury prior to setting for trial. There was therefore no prejudice to appellee due to the delay in making demand.

The fact that defendant removed the cause to the federal court is important for the reason that with such proceedings pending the chances are increased that plaintiff will fall into the trap of an artificial waiver. This was forcefully brought to the attention of all who attended the panel discussion on federal practice at the recent annual meeting of the State Bar of California. At the outset the audience was warned against the serious threat of loss of jury through inadvertence, the panel member discussing the subject stating that some reputable attorneys had even instituted the practice of demanding a jury in their complaints in actions filed in the *state* court if it were even theoretically possible that the actions might later be removed to the federal court. Such elaborate precautions to guarantee preservation of a fundamental right are in themselves a commentary on the unreasonableness of the rules making them necessary.

In the state court plaintiffs commonly demand the jury in the memorandum to set the cause for trial,

and may do so as of right, as late as the time the cause is set on the trial calendar. (California Code of Civil Procedure, Sec. 631.) Until the adoption of the Federal Rules the federal courts followed a similar rule, the jury being waived only by written stipulation, oral stipulation in open court, actual attendance on the trial without objection to lack of jury, or similar conduct clearly showing *intent* to waive the right to jury. (See 28 U.S.C.A., former Sec. 773; *Kelly v. Milan*, 21 F. 842, 854, affirmed 127 U.S. 139, 32 L. ed. 77.) All former laws in conflict with the new rules were declared of no further force and effect (28 U.S.C.A. Sec. 2072, former Sec. 723 b.) The rule was accordingly changed drastically by adoption of the Federal Rules of Civil Procedure, as Rule 38 purported to decree an artificial "waiver", "by rule", if no jury were demanded within ten days after filing of the last pleading directed to an issue. This rule as applied here reversed the burden of showing waiver (the former rule presuming *no* waiver unless contrary intent appeared) in providing for an *irrebuttable* presumption of waiver unless demand be made within the short period stated. Moreover, with the pendency of removal proceedings together with the drastic shortening of time in the federal court as compared to the state rule, it increased the possibility of "waiving", "by rule", the right to a jury trial without any actual intention of doing so.

Thus, when defendant here filed an opposition to plaintiff's motion to remand, the time for demanding a jury had already expired. In other words, by the

time it became clear that the cause would remain in the federal court, the time for demand had gone, although plaintiff would still have had ample time to demand a jury in the state court had remand been ordered.

Apparently it was evident even to the framers of the federal rules that their Rule 38 (completely aside from the constitutional question which they evidently considered solved by their novel definition of "waiver") was very strong medicine and that some provision would be necessary in the interest of justice to provide relief in the cases where an artificial waiver would by definition of Rule 38(d) arise, when in fact no actual waiver really was intended. Rule 39(b) was obviously framed for the sole purpose of providing relief in such cases. It was naturally directed to the discretion of the court since the line between an inadvertent delay barely long enough to technically violate Rule 38 and unaccompanied by any actual intention to waive a jury trial on the one hand, and conduct indicating a clearly intentional and conscious waiver on the other hand (which would deprive litigant of a jury even under the old federal decisions), is obscure, difficult to define, and necessarily dependent upon the many factors peculiar to each individual situation.

Here, though, the evidence is unchallenged and uncontradicted that plaintiff was diverted by other proceedings when her time expired, that the question of jury was not called to her attention after removal until

plaintiff herself moved for it, that no action was taken by the adverse party or by the court in reliance upon plaintiff's failure to make timely demand *and that she did not consciously or intentionally waive her right to a jury trial.*

What, then, was there for the discretion of the court to here consider? Merely the bare technical failure to make demand in the short time allowed. With nothing further to consider, and no prejudice to the court or the adverse party, we submit that the spirit of Rules 38a and 39(b) was ignored and plaintiff's right to a jury was arbitrarily taken from her, even assuming the validity of the rule under the constitution.

C. APPLICATION OF RULE 38(d) OF THE F.R.C.P. TO DENY A JURY TRIAL TO A PARTY IN A COMMON LAW CIVIL ACTION BECAUSE OF INADVERTENCE AND OVERSIGHT BUT WITHOUT CONSCIOUS, INTENTIONAL WAIVER OR PREJUDICE TO THE COURT OR ADVERSE PARTY VIOLATES THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

- (1) Insofar as Rule 38(d) purports to define a "waiver" of trial by jury lacking intentional and voluntary relinquishment of the right, it is contrary to the **Seventh Amendment**.

The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In order to fully appreciate the changes whereby under the case at bar it has become possible for a party to be deprived of this constitutional right through mere inadvertence, a brief examination of the historical background of the law is necessary.

Prior to the adoption of the Federal Rules of Civil Procedure, it was long accepted that a litigant in a historically common law action was entitled to a jury as of right unless he "waived" it either by written stipulation (28 U.S.C.A., former Sec. 723(b)) or by conduct unequivocally indicating an *actual intent* to waive the jury. (*Kelly v. Milan*, 21 Fed. 842, 855; *Smith v. Weeks*, 53 Fed. 758, 762.) Conduct so constituting a waiver consisted of such actions as presence at the trial without demand for jury (*Kearney v. Case*, 79 U.S. 275, 20 L. ed. 395; *Duignan v. U. S.*, 274 U.S. 195, 71 L. ed. 996); entering into a contract which provided that in the event of litigation a jury trial was waived (*idem*); and in a case where "the parties agreed to waive a trial by jury." (*Kelsey v. Forsyth*, 21 How. 85, 16 L. ed. 32.)

Implicit in all "waivers" of the jury, however, was conduct giving evidence of *voluntary* relinquishment thereof. The Supreme Court would indulge no presumption that the fundamental right was waived. The right could be lost by inaction only when so prolonged that voluntary intent to waive was the only inference to be gathered therefrom. Thus the court in *Kearney v. Case*, *supra*, cautioned:

"Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we con-

sider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has *voluntarily waived his right to a jury*, and must be held in this court to the legal consequences of such a waiver. *Phillips v. Preston*, 5 How. 290. *But we are not prepared to go further.*

“If the state of the pleadings presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the court to try those issues without a jury, *because there can be no presumption that the party has waived his legal and constitutional right to have a jury.*” (Emphasis supplied.)

Far from presuming a waiver, the Supreme Court specifically declared in *Baylis v. Travelers' Ins. Co.*, 113 U.S. 316, 320, 28 L. ed. 989, 990, that “This constitutional right this court has always guarded with jealousy.”

In other decisions the court likewise reiterated its view. Thus the court in *Hodges v. Easton*, 106 U.S. 408, 412, 27 L. ed. 169, 171, said:

“It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, *but it could not be taken from them*

by the court. * * * It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, *every presumption should be indulged against its waiver.*" (Emphasis supplied.)

The Supreme Court has also noted that the right to jury is a fundamental *substantial right*, not one of *procedure*, and not to be "directly or indirectly" taken by the court from the jury. *Walker v. New Mexico and S. P. R. Co.*, 165 U.S. 593, 596, 41 L. ed. 837, 841:

"The 7th Amendment, indeed, does not attempt to regulate matters of pleadings or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, *but substance of right*. This requires that questions of fact in common law actions shall be settled *by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative.*" (Emphasis supplied.)

Gasoline Products Company, Inc. v. Champlin Refining Co., 283 U.S. 494, 498, 75 L. Ed. 1188, 1190:

"But we are not now concerned with the form of the ancient rule.

"It is the constitution which we are to interpret; and *the constitution is concerned, not with form, but with substance*. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity

for that consideration by the jury which was secured by the rules governing trials at common law. * * * Beyond this, the 7th amendment does not exact the retention of old forms of procedure". (Emphasis supplied.)

The right to a jury in a historically common law action thus appears to be inviolate, unless consciously, intentionally, voluntarily *waived* by the party and in the words of the Supreme Court in *Hodges v. Easton*, supra, is "secured by the constitution of the United States." (See also in addition to cases above cited, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 81 L. Ed. 1177, 1180, *Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, *Baltimore & C. Line v. Redman*, 295 U.S. 654, 79 L. ed. 1636.)

What, then could be more firmly established than the existence and character of the *fundamental right* to jury? But note what followed:

The Supreme Court was authorized by Congress to prescribe rules for *practice and procedure* in the district courts of the United States, *provided*: "*Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.*" (28 U.S.C.A. Sec. 2072.)

The Supreme Court accordingly prescribed the Federal Rules of Civil Procedure, Rule 38(a) thereof reading: "The right of trial by jury as declared by the Seventh Amendment to the Constitution and

as given by a statute of the United States shall be preserved to the parties inviolate.”

Notwithstanding the above rule, the old statute providing for waiver by written stipulation (28 U.S.C.A. former Sec. 723(b)), being diametrically opposed to the new rule, was considered repealed pursuant to 28 U.S.C.A. Section 2072, par. 4. (See Notes of Advisory Committee on Rules following Rule 38 in 28 U.S.C.A. Rules 17 to 51, page 353, and compare former Section 723(b) to present Rule 38(b) and (d).)

Having given lip service to constitutional guarantee by Rule 38, subsection (a), the *procedural* rule makers went on in subsections (b) and (d) to emasculate this right of substance by providing as follows:

“(b) *Demand*. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.”

“(d) *Waiver*. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) *constitutes a waiver by him of a trial by jury*. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.” (Emphasis supplied.)

In these innocent appearing so-called “*procedural*” provisions, and particularly in the words emphasized,

not only was the burden shifted, as though a presumption existed in *favor* of waiver, but the *substantive* right to a jury trial was abridged and modified. It then followed that certain district courts hereinafter noted interpreted these provisions as instructing them “directly or indirectly to take from the jury” to themselves the determination of questions of fact (contrary to *Walker v. New Mexico & S. P. R. Co.*, *supra*) whenever a technical violation of the rule occurred, regardless of whether there was an actual intent to waive this right of *substance*.

With the rule so worded and so applied, does the rule “abridge” or “modify” a substantive right?

Here, plaintiff submits, is how this rule has *abridged* and *modified* the substantive right to a trial by jury: The rule does not leave the question of whether there was an actual waiver to the trial judge. Instead, whenever there is a failure to comply with the technical provisions of the rule, the rule defines this to be a waiver, *regardless of intention*, then gives to the trial judge *discretion* to grant or not grant a jury trial.

(2) Federal decisions considering the “waiver” provision of Rule 38 in removal cases.

Rather than comparing subparagraph (a) with (b) and (c) and noting the inconsistency and the constitutional infringement, the district courts nevertheless usually granted relief from a failure to comply with the strict provisions of Rule 38(b) and (c) under Rule 39(b) which provides as follows:

“(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.”

This has been especially true in removal cases where time elapsed before complete orientation to the changed procedures was accomplished. We have found only one Circuit Court of Appeals opinion concerning a removal case (*Sofarelli Bros. v. Elgin*, C.C.A. 4th, 129 F. (2d) 785, jury granted despite “waiver”), and no Supreme Court cases considering the matter. The district courts did not consider the constitutionality of the provisions involved, each assuming the “waiver” to be valid and contenting itself with citing Rule 38(b); nor did the above Circuit Court of Appeals, in view of its disposition of the cause, have occasion to do so. Thus the matter of constitutionality of these provisions as applied in this case is here one of first impression in the federal courts.

An examination of the ten discovered removal cases in which the above rules were considered is revealing. In six of them relief from the “waiver” was granted under Rule 39(b). (*Sofarelli Bros. v. Elgin*, *supra*; *Container Co. v. Carpenter Container Corp.*, 9 F.R.D. 261; *Paper Stylists, Inc. v. Fitchburg Paper Co.*, 9 F.R.D. 4; *Ferris v. Farnsworth Television & Radio Corp.*, 8 F.R.D. 489; *Wardrep*

v. New York Life Ins. Co., 1 F.R.D. 175; *Gruskin v. New York Life Ins Co.*, 1 F.R.D. 22.) These cases found a "waiver" solely on the authority of Rule 38(d), but even so there are indications in some that an intent to waive is necessary even for a Rule 38(d) "waiver". (See particularly *Container Co. v. Carpenter Container Corp.* and *Ferris v. Farnsworth Television & Radio Corp.*, *supra*.) Such intent is, of course, an essential ingredient to waiver, as will be developed *infra*.

Examination of the four removal cases found in which relief was *not* granted is equally revealing, all involving factual situations from which an *actual* waiver (i.e., conscious, voluntary relinquishment of a known right) might be inferred. Four to nine months elapsed after the time under Rule 38(b) had expired before relief was sought by the litigant in any of these cases. (*Foch Estates, Inc. v. McDonald*, 1 F.R.D. 506, four months; *Armond v. Chicago B. & Q. R. Co.*, 7 F.R.D. 678, no demand ever filed; *Plack v. Baumer*, 1 F.R.D. 136, nine months; *Munkacsy v. Warner Bros. Pictures, Inc.*, 2 F.R.D. 380, four months.)

Further, in *Foch Estates, Inc. v. McDonald* and *Arnold v. Chicago B. & Q. R. Co.*, *supra*, no attempt whatsoever was made to explain the reason for delay, leaving it to conjecture whether it was inadvertent or by design, and *Plack v. Baumer*, *supra*, presented "complicated contentions" which the court in its discretion thought better tried by a court than a jury. The inadvertent failure to demand a jury was fully

explained in the case at bar, the trial proved to be of a typical personal injury action, with no complications other than those encountered and solved by juries daily, and the demand was made only 31½ weeks late.

In short, the instant case is the only removal case we have found where a jury was denied where it affirmatively appeared on the record that no intent to waive ever existed, and no failure for a period of four or more months to demand jury occurred (such as would support an inference that a waiver was actually intended).

(3) The purported “waiver” defined by Rule 38 (d) is a misnomer as it lacks the recognized factors essential to constitute a waiver.

Let us compare the “waiver” defined by Rule 38(d) with a true waiver of the constitutional right to jury as found in decisions of the Supreme Court and this circuit.

As pointed out in *Hodges v. Easton*, supra, “that right could have been waived, but could not be taken from them by the court”, and “every reasonable presumption should be indulged against its waiver”. We do not argue that the right could not be waived by appellant, but rather that it was not here waived despite the declaration of Rule 38(d) that failure to demand pursuant to Rule 38(b) constituted “waiver”.

This Court gave a concise summary of the essentials of a waiver in *Pacific States Corporation v. Hall*, 166 F. (2d) 668, 671, in the following words:

“At any rate, waiver consists of a *voluntary* and *intentional* relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part.” (Emphasis supplied.)

Accordingly, whether a litigant waives his constitutional right is a matter to be determined from all the circumstances of the case, and not by an inelastic ten-day rule of thumb.

Johnson v. Zerbst, 304 U.S. 456, 464, 82 L. Ed. 1461, 1466:

“It has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’ A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”

See, also:

Michener v. Johnston, C.C.A. 9th, 144 F. (2d) 171.

The reluctance of the Supreme Court to find a waiver of fundamental rights has been reaffirmed since the promulgation of the rules:

Glasser v. United States, 1942, 315 U.S. 60, 69,
86 L. Ed. 680, 699:

“The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. * * * To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 81 L. ed. 1177, 57 S. Ct. 809; *Ohio Bell Telph. Co. v. Public Utilities Commission*, 301 U.S. 292, 81 L. ed. 1093, 57 S. Ct. 724.”

(The court will note that although the *Glasser* case was a criminal action and involved the constitutional right to counsel, the cases cited therein are civil in nature, the *Aetna* case cited involving the right to jury in a civil action.)

It should also be noted that the Supreme Court recognizes that the substance of a right is sometimes attempted to be taken away by indirect means and has forbidden any such tampering with the right to a jury in the guise of a permissible procedural change.

Slocum v. New York L. Ins. Co., 222 U.S. 364,
57 L. Ed. 879, 888:

“It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury will be preserved in name, but will be destroyed in its essential value, and becomes nothing but the machinery through which the court exercises the functions of a jury without its responsibility.”

- (4) Appellant did not waive her right to jury by appearance at the trial after denial of her motion for jury.

Appellee, in the trial court, contended that despite appellant's motion for jury under Rule 39(b) made prior to setting, she nevertheless waived her right to jury by appearing at the trial without further demand therefor, citing *Duignan v. U. S.*, 274 U.S. 195, 71 L. Ed. 996. The designation by appellee of many portions of the record irrelevant to this appeal can lead only to a belief that it intends to renew this argument here despite its lack of merit. The *Duignan* case involved an equity action in which a jury was first requested at the time of trial in an advisory capacity, not as a matter of right. Other cases, cited *infra*, answer appellee's contention.

The only delay in demanding jury here was a 3½ week delay prior to the setting of the cause for trial, as is discussed *supra*. However, appellant's motion was denied and the cause was assigned to the late Judge Herbert W. Erskine to be heard without jury. (Tr. 69-70.) Appellee contended in the lower court on plaintiff's motion for new trial that plaintiff should have *renewed* her motion before trial in order to obtain, in effect, a reversal by the judge who presided at the trial of the order previously made by the judge who ruled on the motion. The district court is *one court* and it is not the province of one judge of the court to review the rulings of another judge. (*Hardy v. North Butte Mining Co.*, 22 F. (2d) 62.) The only procedure for review by a court of its own previous rulings is on motion for new trial. Motion

for new trial was made herein on the error herein urged and was denied.

As the order denying jury was made prior to final judgment, no appeal therefrom was authorized by 28 U.S.C.A. Section 1292. As stated above, the proper and orderly remedy was motion for new trial or appeal from the judgment, review being thereby obtained of all interlocutory orders and appeals from which no appeal has been taken. "Shopping around" among the judges of the same court until a favorable decision is obtained contrary to that of the judge originally ruling on the matter would be distinctly improper and would impair the orderly function of the courts. (*Hardy v. North Butte Mining Co.*, 22 F. (2d) 62, and cases cited.) When appellant's motion for jury was denied, she had no alternative but to go to trial. Her record on the motion had been made and her rights fully preserved.

(5) The District Court erred in denying appellant's motion for jury trial.

It becomes clear, from the examination of the foregoing authorities, that Rule 38(d) has gone too far. The Supreme Court had repeatedly ruled that a litigant was entitled to a jury unless he waived his right, so Rule 38(d) provided a "waiver" unique in the law, a "waiver" under rule by reason of inadvertence as it were. Although bearing the name "waiver" it is hardly the procedure mentioned in the foregoing cases as justifying the deprivation of the constitutional right. Can a fundamental right "secured by

the Constitution of the United States", "always guarded with jealousy", against waiver of which "every presumption should be indulged", and which "could have been waived, but * * * could not be taken from them by the court", be overcome by rules of procedure defining waiver to be something less than its well settled meaning under Supreme Court decisions?

Appellant here never at any time *waived* her right to jury by either word or deed, nor was appellee prejudiced by the short delay in demanding it. The court erred in denying appellant's motion for jury, and judgment should therefore be reversed and trial by jury ordered.

D. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant on November 17, 1950, made timely motion for new trial. Judge Erskine having passed away prior to argument, however, the motion was heard and denied by Judge Roche.

The foregoing argument and authorities concerning abuse of discretion and the constitutionality of Rule 38(d) as applied to the facts of this action are equally applicable here. The honorable district court was given full opportunity to correct its error but did not do so. In refusing to grant appellant a new trial by jury the district court repeated its pretrial error and disregarded the long line of cases cited by ap-

pellant wherein the Supreme Court clearly stated that waiver of jury cannot be presumed, nor can it be taken from a litigant by the court unless waived. The court failed to give relief despite the clear and uncontradicted record that no waiver of jury in fact ever here took place. The order after trial refusing appellant's motion for new trial should therefore be reversed.

Dated, San Francisco, California,
September 5, 1951.

Respectfully submitted,

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

ROBERT H. JOHNSON,

Attorneys for Appellant.

No. 12,975

IN THE

United States Court of Appeals
For the Ninth Circuit

LULA J. WILSON,

Appellant,

VS.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLEE'S REPLY BRIEF.

HADSELL, MURMAN & BISHOP,

SYDNEY P. MURMAN,

RICHARD S. BISHOP,

The San Francisco Bank Building.

405 Montgomery Street, San Francisco 4, California,

Attorneys for Appellee.

FILED

OCT 8 1951

PAUL P. O'BRIEN
CLERK



Subject Index

	Page
Statement of the case	1
Argument	5
I.	
Appellant's case lacked merit	5
II.	
The discretion of the District Court in refusing to set aside waiver of trial by jury was not abused.....	21
A.	
Unfamiliarity with Rule 38 is insufficient to set aside waiver of trial by jury	41
B.	
Appellant acquiesced to her day in court without a jury	46
C.	
The authorities do not support appellant.....	50
Conclusion	52

Table of Authorities Cited

Cases	Pages
Abbe v. New York, N. H. & H. R. Co. (C.C.A.-2, 1948), 171 Fed. (2d) 387	40
Albert v. R. P. Farnsworth & Co. (C.C.A.-5, 1949), 176 Fed. (2d) 198	39
Albert Hoffmann, Inc. v. Textile Mach. Works, 27 Fed. Supp. 431	45
Arnold v. Chicago, B. & Q. R. Co. (U.S.D.C., Neb., 1947), 7 F.R.D. 678	43
Arnstein v. Twentieth Century Fox Film Corporation (U.S.D.C., N.Y., 1943), 3 F.R.D. 58.....	23
Baker v. General Motors Corp. (U.S.D.C., Mich., 1950), 10 F.R.D. 512	29
Bank of Columbia v. Okely, 17 U.S. 235	33
Biddlecomb v. Haydon (1935), 4 Cal. App. (2d) 361.....	18
Bouis v. Aetna Casualty & Surety Co. (1951), 98 Fed. Supp. 176	24
Bowles v. Samonas (U.S.D.C., Pa., 1946), 7 F.R.D. 104....	45
Bullock v. Sterling Drug (U.S.D.C., Pa., 1948), 8 F.R.D. 575	40
Capital Traction Co. v. Hof, 174 U.S. 1.....	34
Container Co. v. Carpenter Container Corp., 9 F.R.D. 261	51
Coralnick v. Abbotts Dairies, 337 Pa. 344, 11 Atl. (2d) 143	17
Dahms v. General Elevator Co. (1932), 214 Cal. 733.....	9
Delno v. Market St. Ry. Co. (C.C.A.-9, 1942), 124 Fed. (2d) 965	29
Duignan v. United States, 274 U.S. 195.....	35, 46
Ettelson v. Metropolitan Life Ins. Co. (C.C.A. 3, 1943), 137 Fed. (2d) 62 (Certiorari Denied, 320 U.S. 777).....	22
Ferris v. Farnsworth Television & Radio Corp., 8 F.R.D. 489	51
Fidelity & Deposit Co. v. Krout (C.C.A. 2, 1946), 157 Fed. (2d) 912	26

TABLE OF AUTHORITIES CITED

iii

	Pages
Fidelity & Deposit Co. v. United States, 187 U.S. 315.....	34
Fireman's Ins. Co. of Newark v. Smith (C.C.A.-8, 1950), 180 Fed. (2d) 371 (Certiorari Denied, 339 U.S. 980).....	48
Fitzpatrick v. Sun Life Assur. Co. of Canada (U.S.D.C., New Jersey 1941), 1 F.R.D. 713	23
Gasifier Mfg. Co. v. General Motors Corporation (C.C.A.-8, 1943), 138 Fed. (2d) 197.....	37
Gerber v. Faber (1942), 54 Cal. App. (2d) 674, 129 P. (2d) 485	12, 13
Gora v. Jenkins Bros. (U.S.D.C., Conn., 1948), 8 F.R.D. 32..	41
Gordon v. Aztec Brewing Co. (1949), 33 Cal. (2d) 514, 203 P. (2d) 522	13
Great Altantie & Pacific Tea Company v. Kennebeek Water District (1943), 140 Maine 166, 34 Atl. (2d) 729.....	18
Gruskin v. New York Life Ins. Co., 1 F.R.D. 22.....	52
Gulbenkian v. Gulbenkian (C.C.A.-2, 1945), 147 Fed. (2d) 173	38
Hargrove v. American Cent. Ins. Co. (C.C.A.-10, 1942), 125 Fed. (2d) 225	23, 48
Honea v. City Dairy, Inc. (1943), 22 Cal. (2d) 614, 140 P. (2d) 369	9, 10, 11, 16, 17
Hubbert v. Aztec Brewing Co. (1938), 26 Cal. App. (2d) 664	19
Irvine v. Luckenbach Steamship Co. (U.S.D.C. N.Y., 1946), 7 F.R.D. 127	41
Johnson v. Gardner (1949), 179 Fed. (2d) 114 (Certiorari Denied, 339 U.S. 935)	24
Kass v. Baskin (U.S.C.A., D.C., 1947), 164 Fed. (2d) 513..	30, 33
Kennedy v. David (U.S.C.A., D.C., 1940), 109 Fed. (2d) 676	32, 33
Krussman v. Omaha Woodmen Life Ins. Soc. (U.S.D.C., Idaho, 1941), 2 F.R.D. 3	43
Lueid v. E. I. DuPont etc. Powder Co., 199 Fed. 377.....	19
MaeDonald v. Central Vermont Ry., Inc. (U.S.D.C., Conn., 1940), 31 Fed. Supp. 298	42, 45
May v. Melvin (U.S.C.A., D.C., 1944), 141 Fed. (2d) 22...	27

	Pages
McNabb v. Kansas City Life Ins. Co. (C.C.A.-8, 1943), 139 Fed. (2d) 591	28, 29
Missouri Pac. Transp. Co. v. George (C.C.A.-8, 1940), 114 Fed. (2d) 757 (Certiorari Denied, 312 U.S. 681).....	37
Paper Stylists, Inc. v. Fitchburg Paper Co., 9 F.R.D. 4....	51
Patton v. United States, 281 U.S. 276.....	36
Piehl v. Albany Ry., 51 N.Y. Supp. 755, affirmed 162 N.Y. 617, 57 N.E. 1122	16
Prince Line v. American Paper Exports (C.C.A. 2, 1932), 55 Fed. (2d) 1053	35
Reeves v. Pennsylvania R. Co. (U.S.D.C., Md., 1949), 9 F.R.D. 487	40
Roth v. Hyer (C.C.A.-5, 1944), 142 Fed. (2d) 227 (Cer- tiorari Denied, 323 U.S. 712)	38, 39
Slack v. Premier-Pabst Corp. (1939), 40 Del. 97, 5 Atl. (2d) 516	14
Smith v. Cushman Motor Works (C.C.A.-8, 1950), 178 Fed. (2d) 953	47
Sofarelli Bros. v. Elgin (C.C.A.-4, 1942), 129 Fed. (2d) 785	50
State of Delaware v. Massachusetts Bonding & Ins. Co. (U.S. D.C., Del., 1942), 3 F.R.D. 65.....	41
Steiger v. Mullaney (U.S.D.C., N.Y., 1948), 8 F.R.D. 486...	40
Steinhardt Novelty Co. v. Arkay Infants Wear (U.S.D.C., N.Y., 1950), 10 F.R.D. 321.....	40
Stodder v. Coca-Cola Bottling Plants (Maine, 1946), 48 Atl. (2d) 622	17
United States v. Strewl (C.C.A.-2, 1938), 99 Fed. (2d) 474..	36
Wardrep v. New York Life Ins. Co., 1 F.R.D. 175.....	51
William Goldman Theatres v. Kirkpatrick (C.C.A.-3, 1946), 154 Fed. (2d) 66	27
Woodworkers Tool Works v. Byrne (1951), C.C.A.-9, Docket No. 12,548	10
Yakus v. United States, 321 U.S. 414.....	35
Zentz v. Coca Cola Bottling Co. (1949), 92 Cal. App. (2d) 130	13

TABLE OF AUTHORITIES CITED

v

Constitutions

United States Constitution :	Pages
Sixth Amendment	36
Seventh Amendment	34

Statutes

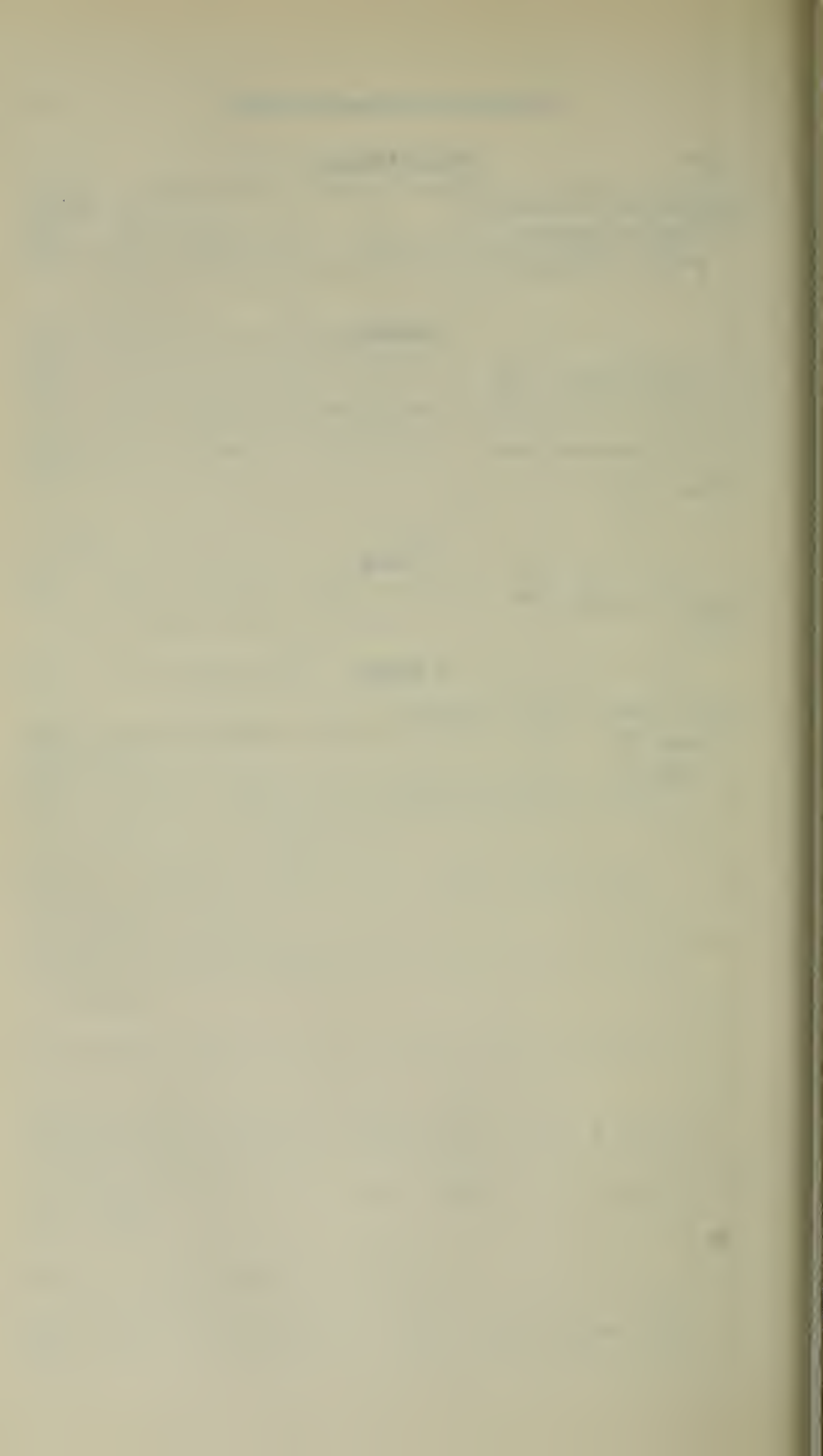
Civil Code, Section 1735	12
28 U.S.C.A., Section 2072, formerly Section 723(c)	21
28 U.S.C., Section 1446	1, 2
48 Stat. 1064	21

Texts

22 Am. Jur., page 214	19
-----------------------------	----

Rules

Federal Rules of Civil Procedure :	
Rule 38	2, 21, 22, 24, 25, 46, 50
Rule 52	20



No. 12,975

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

The record shows that appellant sued appellee as a foreign corporation in the state Court of San Francisco on August 4, 1949. Appellee was served at San Francisco that same day inasmuch as appellee was doing business in the State of California. Pursuant to Title 28 U.S.C., Section 1446, appellee's petition and bond for removal was thereafter properly filed on August 18, 1949. Copies of the same were filed in the state Court the same day. On August 19, 1949, appellant's attorneys were served with an appropriate notice of the removal. Thereafter appellee served and filed its answer in the District Court on August 25, 1949. (R. 3-17.)

Apparently not being aware of the applicable removal procedure giving appellee a flat twenty days after service of summons issued by the state Court to petition the District Court for removal regardless of what transpired in between, appellant moved to remand this case to the state Court on August 29, 1949, contending that the removal was not timely. The grounds for this contention apparently were that on August 15, 1949, three days prior to the filing of the petition for removal, the parties hereto had stipulated to a ten day extension of appellee's time to plead. Had this occurred before Section 1446 was enacted, appellant's motion to remand to the state Court may have had merit. Consequently, as soon as appellee filed an affidavit in opposition to the motion to remand, calling the attention of appellant's attorneys to Section 1446, appellant abandoned her motion to remand the following day, September 6, 1949. (R. 17-22.) So much for the "removal" which appellant mistakenly urges as excusable neglect to make timely demand for jury trial. (A.O.B., 6-11.)

As to the facts regarding the waiver of a jury trial, the record shows that removal proceedings were completed before appellee filed its answer on August 25, 1949. As appellant discovered by her abortive attempt to remand the case, removal had been consummated a week before. This should have focused appellant's attention on the current Federal practice applicable to her case. However, appellant made no timely demand for a jury trial as required by Rule 38, Rules of Civil Procedure. In fact, it was not

until September 27, 1949, when the clerk of the Court below notified counsel that the case would receive a trial date on October 3, 1949, that appellant apparently checked the rules and found that the usual memorandum to set, required of appellant in the state Court practice in demanding or waiving a jury there was not required under Federal practice where the District Court acted on its own motion to set cases for trial. Following the Clerk's notice, appellant's attorney got busy and found that appellant had not made timely demand for a jury trial as required by Rule 38. Accordingly, appellant served a motion requesting trial by jury "due to the inadvertence and mistake of affiant as plaintiff's counsel" to not make timely demand for a jury trial in accordance with the Rule. (R. 23-26.)

Appellee opposed appellant's motion because "ignorance of the law is no excuse", and, in addition, since this was a proper case for the Court to pass upon, due, if nothing else, to the technical testimony regarding the manufacture and processing of glass products, the trial Court was urged, in the exercise of sound discretion, to deny the motion. (R. 61-69.) After hearings, and on October 10, 1949, Judge Roche denied appellant's motion (R. 26-27) with the following comments (R. 69):

"The Court. Is the matter submitted?

Mr. Johnson. Yes, your Honor.

The Court. The motion will have to be denied on the record. Now, do you want to set it down for trial?

Mr. Johnson. Yes, your Honor.

Mr. Bishop. Yes, your Honor. We were discussing the matter and we both agreed a date around the middle of January would be satisfactory to both sides.

Mr. Johnson. Somewhere along the middle of the month.

The Court. The 24th of January."

Subsequently, when the Master Calendar Judge assigned the case for trial, when the case was actually called for trial by the trial judge, during the four day trial thereof, when briefs were ordered by the trial judge, and when the case was finally submitted for final decision, appellant at no time mentioned trial by jury. (R. 27-33.) Had appellant proved her case, then she would have recovered judgment and trial by jury would have become moot. As it was, the record shows that after appellant had her day in Court and had failed to prove her case, requiring that judgment be entered for appellee, appellant then urged error in the refusal of the District Court to set aside her waiver of trial by jury as one of two grounds on her motion for new trial. (R. 54-56.) Due to the illness and untimely death of Judge Erskine, the trial judge, the hearing on the motion for new trial was referred to Judge Roche who reheard appellant fully on the matter of trial by jury and denied the motion on both grounds. (R. 58-60.) Then followed this appeal. (R. 60.)

ARGUMENT.

Appellee contends that there was no error in the refusal of the District Court to set aside appellant's waiver of trial by jury and, further, that appellant could not have been prejudiced because she failed to prove her case, requiring that a motion for involuntary dismissal be granted withdrawing the case from the trier of the facts.

Appellee also contends that the record shows no compelling reason in law or in fact why the Court below should have granted appellant's motion to set aside her waiver of trial by jury.

I.**APPELLANT'S CASE LACKED MERIT.**

Appellant had her day in Court, in fact four days were required for the trial. She failed to prove her case. (R. 52.) Yet she says she was prejudiced by not having a jury trial and now wants a new trial because the trier of the facts who found against her was a District Judge and not a jury.

Proof of the incident of the breaking of the glass dish and the consequent injuries, both of which are substantially undisputed, consumed much less of the Court's time than proof by the parties and their experts, Messrs. Rhodes, Pask and McClellan, of the characteristics and manufacture of glass. (R. 28-31.) In ordering judgment to be entered in favor of appellee after hearing this mass of technical testimony, the

trial judge filed a helpful "Memorandum Opinion" containing a "Statement of Facts" which, among other things, included the following (R. 35-37):

"The evidence shows that subsequent to its manufacture the bowl was placed in a carton, which was packed in a box containing several separate cartons, and that this box was shipped by train to a jobber in San Francisco. It was purchased by the jobber F.O.B. New York. Upon reaching its destination the box was unloaded into a truck, and then taken to the jobber's warehouse where it was unloaded. Thereafter, it was reloaded on a truck, delivered to the Emporium-Capwell Company store in Oakland, California, unloaded and put in a storeroom. Subsequently the box was opened and the contents placed upon the store shelves for sale. There is no evidence that during these many handlings the bowl or dish did not sustain some shock or bump which might have caused a defect, with the exception of the testimony of a jobber, who often sold this ware to the store, that if a carton box had been damaged in transit it would be inspected by him and any damaged contents removed; the testimony of the person in charge of the department which handled the ware to the same effect; and the testimony of the plaintiff and her husband that they made a visual inspection when they brought the bowl into their home and found no visible defects. Neither the jobber nor the representative of Emporium-Capwell could say anything about this particular piece of Pyrex ware. Their testimony merely went to their method of handling the ware from manufacturer to consumer. The jobber could not say that he was the particular jobber who sold this particular bowl to the store.

The testimony of both the plaintiff's and defendant's experts is that this glass could break from defects such as a scratch, a chip, a crack, or some internal defect resulting from a bump or shock. The supervisor of the testing department of the defendant testified that a deep scratch might not affect the durability of a dish, whereas a slight scratch might cause it to break. If this be so, it is in the realm of possibility that in the casual visible inspection made by plaintiff and her husband of the dish after they brought it home they may have overlooked some apparently slight defect, which subsequently caused the break. When they received the dish from the store it was wrapped. They bought it from a sample and did not examine it until they reached home."

From the facts, the Court drew "Legal Conclusions" which included the following (R. 38-39, 46-48):

"Plaintiff's counsel contends that under the doctrine of *res ipsa loquitur* she is entitled to recover because she has shown that the breaking occurred through faulty annealing, and that defendant has failed to show proper care upon its part in the manufacture and inspection of its product.

As a primary consideration for this doctrine to be applicable to a case of this kind, all other causes than defendant's negligence must be excluded. In other words, that doctrine can only be applied where the nature of the accident not only supports the inference of defendant's negligence, but excludes all others.

Hubert v. Aztec Brewing Co., 26 Cal. App. (2d) 664, 688.

It is sometimes said that this doctrine does not apply if the particular product involved in reaching the consumer from the manufacturer has passed through other hands.

Gerber v. Faber, 54 Cal. App. (2d) 674.

This statement may or may not go too far, but it is clear that the burden of proof to show careful handling and to exclude any inference of any other cause or causes is upon the plaintiff. *Zentz v. Coca Cola*, 92 A.C.A. 140. It is difficult to find that plaintiff has sustained this burden of proof. In the many handlings of this article from manufacturer to consumer there is no evidence of how carefully it was done. There is no evidence that the article did not in such transit receive a bump, shock or slight crack or scratch, which weakened it and subsequently led to the breaking.”

* * * * *

“In the light of the evidence in this case it cannot be said that the common experience of the manufacturer and others in this line of business forms a basis for an inference that if there were a defect it was reasonably certain to put life or limb in peril, or that the accident is of the kind that does not occur unless some one is negligent. These bowls were produced at the rate of twenty-five pieces per minute. The jobber who testified stated that he alone handled fifteen to twenty carloads of this commodity a year, and there were other jobbers beside him who supplied the Emporium-Capwell Company with these goods. There is no evidence in the record that the breaking of this ware ever hurt or injured any one before. None of its ingredients has any explosive properties. While glass is brittle and

will break it is regarded as inherently non-dangerous. The piece involved in this case was simply an open bowl which even if defective and susceptible of breaking would not ordinarily in the nature of things injure or hurt the person handling it.

The question of reasonable care is to be examined in the light of all these considerations. If this article were one which was to be filled with charged water or other liquid, or if it were a chair which if it broke might cause an injury, the degree of care constituting reasonable care involved in the manufacture thereof would, of course, be greater, because a defect in either bottle or chair would be reasonably certain to cause serious harm.

Since, under the circumstances of this case, there was not such reasonable certainty, and since it was shown that during the course of the manufacture of this kind of ware at defendant's plant specimens of each batch were given a thermal test, an abrasion test, a dropping test, a polariscope, and several similar inspection tests, and that such manufacturing was done under a controlled process, so that these tests would speak for all the ware in the batch so tested, to hold defendant liable in this case would be tantamount in my opinion to making a manufacturer an insurer of his product."

Based on the facts, the conclusions reached by the District Court were sound and supported by the authorities. The manufacturer "is in no sense an insurer". (*Dahms v. General Elevator Co.* (1932), 214 Cal. 733, 741. Also *Honca v. City Dairy, Inc.* (1943).

22 Cal. (2d) 614, 140 P. (2d) 369, is controlling. (*Woodworkers Tool Works v. Byrne* (1951), CCA-9, Docket No. 12,548.) It will be observed from the *Honea* case that the California Supreme Court made a thorough review and analysis of the problems involving the breakage of a glass bottle (as distinguished from a container filled with a charged beverage), and, in effect, re-affirmed the California law on the points involved. It is true the defendant there was a bottler as distinguished from the manufacturer of the glassware in our case, but this is a distinction without a difference. The bottler is required to use ordinary care in making his inspections before use of the bottle. It is true the type of inspection required of a bottler and a manufacturer differs, but ordinary care is required in each case and that is a fundamental point in the *Honea* case. The defendant bottler produced evidence of the inspection it employed. The Court stated at page 618: -

“The mere breaking of the bottle alone cannot give rise to an inference that defendant was negligent in failing to discover the defect. While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

Because of lack of proof, appellant asked the Court below to take judicial notice that defects will not occur unless there is negligence, and that glassware is not ordinarily damaged between the time it left appel-

lee's possession and control—some 3,000 miles away—and the time the breakage occurred weeks later in the hands of appellant as the consumer. On this point we again quote from the *Honea* case at page 620:

“Nor can the court take judicial notice that glass bottles are not ordinarily damaged or that defects will not ordinarily occur unless the bottler is negligent, for the subject is not a matter of common knowledge.”

Since the *Honea* case recognizes that the defect could have been caused by a third person, in effect, appellant asked the Court to accept speculation and conjecture in lieu of proving her case just because the ovenware broke. In this connection we quote further one of the most important (and, to our case, pertinent) statements of the *Honea* case, at pages 620-621:

“While it may often be a matter of common knowledge that certain articles or substances are not ordinarily rendered defective in the absence of negligence, we cannot say that this is true of glass containers. It has been held that because of the physical characteristics of glass an inference of negligence cannot be drawn from breaking alone.” (Cases cited.)

Appellant did not have to buy Pyrex ovenware, but having done so, she was charged with common knowledge that glass is breakable and that each one into whose possession it comes, including the ultimate consumer, must handle it with care. When it broke, then to infer negligence solely on the part of the manu-

facturer placed the burden on the manufacturer of an insurer, encouraging carelessness and abuses on the part of jobbers and retailers. After all, they also should continue to have duties to those who purchase from them. No retailer should with impunity sell a defective product known to him to be defective but not observable by the inexperienced eye of the consumer and escape liability to the detriment of the manufacturer. No retailer should even consider himself relieved of the duty to inspect on the theory that his dereliction would be passed on to the manufacturer as an insurer. Apparently some such theory as that explains why appellant did not sue the retailer and the jobber and require them to set forth the methods they employed to establish reasonable care in the inspection and handling of the ware. If they had been sued, at least they might have been liable for breach of implied warranty of quality under the uniform sales act. (California Civil Code, Section 1735.)

The Court below cites *Gerber v. Faber* (1942), 54 Cal. App. (2d) 674, 129 P. (2d) 485, where plaintiff was cut when a bottle of root beer burst. He was the ultimate consumer. Between him and the defendant bottler, the product had passed through the hands of a distributor and a retailer. Judgment went against plaintiff, even in this, a charged beverage case, where there was faulty proof as to transit. We quote at pages 685-686:

“When, therefore, it becomes incumbent upon plaintiff to establish negligence other than by application of the doctrine of *res ipsa loquitur*, be-

cause the proof does not show exclusive control in the defendant, he must go all the way with his evidence and prove some act or omission on the part of the defendant or defendants upon whom he would fasten responsibility. A contrary rule would upset many settled rules of evidence in negligence cases.”

Thus in the *Gerber* case, the testimony of the distributor was that the bottle was in his truck for a week, with no evidence that (p. 686) “the bottle had been handled *carefully* during that time or during the process of its delivery to defendant Faber, nor by the latter or his employees when it was placed in the cooler.” To relate the lack of evidence in that case to the lack of similar evidence in our case seems unnecessary. The Court also states at page 686:

“The *res ipsa loquitur* doctrine cannot be applied so as to raise an inference that the bottle was cracked while in defendant’s possession, to the exclusion of the inference that it may have been cracked thereafter.”

The Court below also cites *Zentz v. Coca Cola Bottling Co.* (1949), 92 Cal. App. (2d) 130 (Rehearing and California Supreme Court hearing denied, 135), which is of interest in describing the *burden on appellant* in showing that the ovenware received careful handling in transit and elsewhere from the time it left appellee’s possession and control until the accident occurred. The *Zentz* case, at pages 134-135, quotes and comments on an instruction from *Gordon*

v. Aztec Brewing Co. (1949), 33 Cal. (2d) 514, 203 P. (2d) 522, as follows:

“A defendant is deemed to have control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant’s possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of *res ipsa loquitur*, the plaintiff must show that *every person who moved or touched the bottle* after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces.”

* * * * *

“The question, therefore, was not left to the jury, but under the instruction, as here given, the court told the jury that ‘* * * from the happening of the accident involved * * * there arises an inference that the proximate cause * * * was some negligent conduct on the part of the defendant.’ Such is not the law. (*Honea v. City Dairy, Inc.*, *supra*.) We must conclude, therefore, that the giving of the general instruction without a sufficient explanatory instruction, was prejudicially erroneous.” (Emphasis ours.)

Going to other jurisdictions, we cite the case of *Slack v. Premier-Pabst Corp.* (1939), 40 Del. 97, 5 Atl. (2d) 516. There plaintiff was an employee of a retailer and when serving a customer a bottle of

beer, made, bottled, sold and distributed by defendant, a bottle exploded before any attempt was made to remove the cap. Judgment was for the defendant. We quote the following pertinent paragraphs from page 519:

“Glass is a highly inelastic substance, and although it does not become weakened through age alone, yet it is a brittle material, and may become weakened through the application of some physical force. Moreover, the sudden expansion or contraction of its surfaces, sufficient to cause cracks or breaks therein, due to abrupt changes of temperature is a well known physical phenomenon. It is common knowledge that bottled beverages are transported and handled with abandon. It will not do, we think, to say that, as the bottle exploded, inferentially some one was negligent; nor, by a process of exclusion, to permit an inference of negligence to fall upon the bottler after the commodity has passed out of his control. The bottler of carbonated or fermented beverages is not an insurer. There is room in cases such as this for the recognition of the doctrine of unavoidable accident. The existence of negligence is not an ineluctable conclusion. But conceding, *arguendo*, that negligence on the part of some one must be inferred, the plaintiff must prove facts from which, as a logical probable and reasonable deduction, the negligence of the defendant is inferred. Its existence cannot be a matter of surmise or conjecture.

The count of the declaration questioned by demurrer charges no more than that the plaintiff.

without fault on his part, was injured by the bursting of a bottle of beer bottled by the defendant. Proof of the facts alleged would leave to mere speculation the true cause of the occurrence. It is no more probable that the defendant's negligence was the cause of the explosion and resulting injury, than was the negligence of others who had the management, supervision and control of the bottle after it had been delivered safely by the defendant. In such case, the plaintiff must fail. See *Law v. Gallagher*, Del. Sup. 197 A. 479."

We also cite *Piehl v. Albany Ry.*, 51 N. Y. Supp. 755, affirmed 162 N. Y. 617, 57 N. E. 1122. While this case dates back to 1898, it was cited as authority by the California Supreme Court in the *Honea* case. A flywheel burst and a fragment killed plaintiff's intestate. Among other things, the plaintiff contended that the fact that the flywheel burst is of itself presumptive evidence of negligence. The Court declined to go along with this, and stated at page 757:

"Such are the limitations upon human foresight that every reasonable care does not always prevent accidents and that such is the nature of steam and electricity and of the engines by or upon which they operate that when such an explosion occurs our experience, or even expert experience, is not sufficiently uniform to justify us in presuming that negligence is the cause. To punish the defendant because it cannot explain the cause of the explosion is not to punish it because it has done wrong, but may be because it does not know what we wish to find out. * * *

Its bursting was a single unusual and exceptional circumstance. The unexpected happened. When a power magazine in a thickly inhabited locality explodes, the expected does happen."

We also refer the Court to another case, *Coralnick v. Abbotts Dairies*, 337 Pa. 344, 11 Atl. (2d) 143. A summary of the facts and the holding in this case is given at page 621 of the *Honea* case, and therefore we refrain from commenting further upon it.

We also cite the case of *Stodder v. Coca-Cola Bottling Plants* (Maine, 1946), 48 Atl. (2d) 622. Plaintiff, the operator of a restaurant, was putting a coca-cola bottle in the refrigerator when it burst in her hands. The plaintiff relied upon the doctrine of *res ipsa loquitur*, which the Court declined to consider, stating that the negligence must be shown and that the defendant is not an insurer. The Court said at page 624:

"It must not be a question of conjecture. The circumstances of the accident must indicate negligence. (Citing authorities.) If there are several reasons why the accident may have happened, for some of which the defendant would be liable, the jury is not at liberty to guess which reason caused the accident. (Citing authority.) Where, in a negligence case there are two or more possible causes and the true cause is conjectural, 'the Court cannot, and a jury should not, select.' (Citing authority.)

In this case the instrumentality, viz., the Coca-Cola bottle, was not, at the time of the accident,

in the possession of the defendant or under the defendant's control. It was in the possession and control of the plaintiff. The plaintiff contends that it should be considered as in control of the defendant, because it had so recently been in the possession of the driver of defendant's truck and there had been no change in circumstances. If the rule, that the instrument should be in the control of defendant, can be changed 'for a few minutes,' why not for a longer period?"

We also refer the Court to *Great Atlantic & Pacific Tea Company v. Kennebeck Water District* (1943), 140 Maine 166, 34 Atl. (2d) 729. The defendant water company installed a meter on plaintiff's property. The bottom of the meter came off and extensive water damage resulted. The Court commented that there was no adequate explanation for the accident. Plaintiff rested its case on *res ipsa loquitur*. The Court stated:

"The rule does not apply as the accident was caused by a defect in an instrumentality not discoverable on reasonable inspection and for which fault the defendant was not responsible, even though such instrumentality may have been in use by defendant and under its control."

In *Biddlecomb v. Haydon* (1935), 4 Cal. App. (2d) 361, at 364, the holding is that the rule of *res ipsa loquitur* does not apply

"where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible." (Cases cited.)

In *Hubbert v. Aztec Brewing Co.* (1938), 26 Cal. App. (2d) 664, 688, the court quoted from *Lucid v. E. I. DuPont etc. Powder Co.*, 199 Fed. 377:

“ ‘The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant’s negligence, but excludes all others.’ ”

We also quote from 22 *American Jurisprudence* at page 214, as follows:

“ ‘The decided weight of authority is to the effect that the rule of *res ipsa loquitur* is not applicable to the bursting or exploding of a container in which an ordinarily harmless commodity is sold.’ ”

With regard to this quotation we repeat what we stated above, namely, that the breakage of glass in our case is the same as the breakage of a glass bottle containing a harmless, uncharged commodity.

From the foregoing, it will be observed that, in general, the doctrine of *res ipsa loquitur* is not applicable to the mere breakage of glass. Nor, in addition, could appellant invoke the doctrine, for the Court below held that there was a total lack of evidence that any care at all was used in handling the piece of glassware while in transit, or elsewhere, between the time it left appellee’s possession and control and the time the accident happened. In the language of the cases, “In order to be entitled to the

benefit of the doctrine of *res ipsa loquitur*, the plaintiff must show that every person who moved or touched the (ovenware) * * * did so with due care and that during said time the (ovenware) was not accessible to extraneous harmful forces."

Furthermore, the rule of *res ipsa loquitur* does not apply where "the cause of the accident is unexplained and might have been due to one of several causes, for one of which the defendant is not responsible." Or to put it another way, speculation and conjecture could not be resorted to in lieu of legal proof fixing responsibility upon appellee. For any one of these reasons, therefore, appellant could not recover, and accordingly the Court found (R. 52):

"6. The evidence failed to support plaintiff's allegation that Corning Glass Works was negligent and careless in the manufacture and construction of said baking dish."

* * * * *

"10. Plaintiff failed to prove that said baking dish had not changed in any respect after it left the possession of defendant Corning Glass Works at its factory in Corning, New York, and prior to said baking dish breaking while being washed by plaintiff in Berkeley, California, as aforesaid."

There can be no question but what the above quoted findings are sound. (Rule 52, Rules of Civil Procedure.) Nothing appears in the record to the contrary. Appellant has not questioned them on this appeal. They show that appellant failed to prove the charging allegations of her complaint and therefore had no case against the appellee, either for actual negligence or

res ipsa loquitur. Consequently, appellant could not have been prejudiced by the District Court's refusal to set aside her waiver of trial by jury when the record shows that she did not make out a case and could not have gotten to the jury for a verdict. A motion for involuntary dismissal would have been granted to withdraw the case from the trier of the facts.

II.

THE DISCRETION OF THE DISTRICT COURT IN REFUSING TO SET ASIDE WAIVER OF TRIAL BY JURY WAS NOT ABUSED.

The Seventh Amendment of the Federal Constitution has not been violated merely because the District Court followed Rule 38, Rules of Civil Procedure, as promulgated by the Supreme Court. The notes of the Advisory Committee on the Rules of Civil Procedure make it clear that this question was carefully considered before Rule 38 was adopted as part of Title 28, United States Code. These notes show that the Advisory Committee regarded the rule as providing for the preservation of the constitutional right of trial by jury as directed in the enabling act of June 19, 1934; 48 Stat. 1064; Title 28, U.S.C.A., Section 2072, formerly Section 723(c). It was pointed out that Rules 38 and 39 make definite provision for claim and waiver of jury trial, following the method used in many American states, in England and in the British Dominions. Also, it was shown that the demand for jury trial must be made at once, either on initial pleading or appearance in some states, includ-

ing Illinois, Tennessee and Wyoming, or within ten days after the pleadings are completed and the case is at issue, as required by other states, including Connecticut, Massachusetts and Michigan, as well as Hawaii, England and Ontario, or at a definite time varying under different codes from ten days before notice of trial to ten days after notice, or, as in many states, when the case is called for assignment, as required by Arizona, California, Iowa, Nevada, New Mexico, New York, Rhode Island, Utah, and Washington, and under certain provisions of the laws of England, Australia, Alberta, British Columbia and New Brunswick.

In the Commentaries to Rule 38, the following appears:

“ ‘Some contention has been made that the right to trial by jury is not preserved within the meaning of the United States Constitution if the party is required to do an affirmative act in order to avoid being deprived of that right. The seriousness of this objection is doubtful, however, in view of the fact that similar provisions in state codes have been upheld.’ Daniel K. Hopkinson, 23 Marq. L. Rev. 159.”

Rule 38, which is part of the Judicial Code as enacted by Congress, has been considered many times by the Courts in connection with the point raised by appellant. In *Ettelson v. Metropolitan Life Ins. Co.* (C.C.A. 3, 1943), 137 Fed. (2d) 62 (Certiorari Denied, 320 U.S. 777), the Court said at page 65:

“Basic issues formerly triable as of right by a jury are still triable by a jury as a matter

of right. Rule 38, 28 U.S.C.A. following section 723c."

In *Hargrove v. American Cent. Ins. Co.* (C.C.A. 10 1942), 125 Fed. (2d) 225, the Court said at page 228:

"Under the Federal rules of civil procedure, which are made expressly applicable, rule 57 F.R.C.P., there is but one form of civil action, in which the right of a trial by jury is recognized and adequately preserved. (Citing authorities, including *Pacific Indemnity Co. v. McDonald* (C.C.A. 9, 1939), 107 Fed. (2d) 446, 448.)"

In *Arnstein v. Twentieth Century Fox Film Corporation* (U.S.D.C., N.Y. 1943), 3 F.R.D. 58, the Court struck out a demand for a jury, and said at page 59:

"Rule 38 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, prescribes the steps to be taken for assuring enjoyment of the right to a jury trial, if such right exist; but that rule did not create the right. The source of the right is the law (constitutional and statutory) as it stood preceding the adoption of the rules.

Subdivision (d) of Rule 38 provides that a failure by a party 'to serve a demand' as required by the rule and to file it in the Clerk's office 'constitutes a waiver by him of trial by jury.' The importance, therefore, of complete conformity with the rule is manifest."

In *Fitzpatrick v. Sun Life Assur. Co. of Canada* (U.S.D.C., New Jersey 1941), 1 F.R.D. 713, the Court

again struck out a demand for a jury, and said at page 716:

“The right of trial by jury is neither extended nor restricted but is preserved inviolate under the rules.”

In the most recent case reported prior to the writing of this brief, the United States District Court for the Western District of Louisiana, in *Bouis v. Aetna Casualty & Surety Co.* (decided June 18, 1951), 98 Fed. Supp. 176, reiterated the point at page 177:

“The Rules of Federal Procedure, No. 38, preserve the right of jury trial under the Seventh Amendment, but, for practical reasons, specify the manner in which it shall be exercised in order to carry out the principal purposes of those rules to simplify and expedite the procedure of the federal courts.”

Thus we see that Rule 38 is as its title implies, the applicable rule of procedure for a jury trial, which in no way alters the substantive right of trial by jury. In this connection, appellant seems to concede that procedures may be changed so long as substantive rights are unaltered, and that is exactly what has occurred in the promulgation of Rule 38 by the Supreme Court of the United States pursuant to statute.

Apparently this Court has had a prior opportunity to consider the question of the trial Court's discretion in refusing to set aside a waiver of trial by jury. In *Johnson v. Gardner* (1949), 179 Fed. (2d)

114 (Certiorari Denied, 339 U.S. 935), a trustee in bankruptcy sued the bankrupt and others to set aside alleged fraudulent conveyances of real property as well as for an accounting of rents collected, for money judgment, for costs and other appropriate relief. On February 10, 1948, the defendants filed a joint answer denying fraud and alleging validity of the conveyances, and praying that title be decreed vested in defendants other than defendant bankrupt, and that the plaintiff take nothing, with the defendants being awarded costs. On November 23, 1948, the case was called for trial and for the first time the matter of a trial by jury was brought up. Apparently a panel of prospective jurors was in attendance "as the result of a recent demand made subsequent to the period prescribed by Rule 38". The plaintiff objected to a trial by jury as required by the defendants and the Court ruled that the same had been waived, excusing the panel in attendance. The trial proceeded and resulted in a decision in favor of the trustee as to the fraudulent conveyances and costs, and in favor of the defendant bankrupt as to an accounting. The remaining defendants then appealed solely on the issue of whether or not the Court erred in refusing to set aside the waiver of trial by jury.

This Court held that the case was one in equity to remedy the wrong wrought by fraud and consequently a jury was not required. However, as we read the opinion of the Court, this Court held that had the case been a proper case for a trial by jury upon a timely demand, nevertheless the record "posi-

tively shows that any original right to a jury trial had been irrevocably waived" (p. 117). As to setting aside a waiver, this helpful dicta is stated on page 118:

"But of course there is what might be called a 'saving clause' in Rule 39(b) of the Federal Rules of Civil Procedure which may warrant the court to order a trial by a jury although the movant therefore may have waived his right to such mode of trial by failure to comply with the mandatory provisions of Rule 38. A motion under Rule 39(b) is however addressed to the discretion of the court and we cannot say in light of the record before us that the action of the trial judge in the court below in declining to call a jury to try the case amounted to an abuse of judicial discretion. *Delno v. Market Street Ry. Co.*, 9 Cir., 1942, 124 F. 2d 965."

In so holding, this Court cited a number of prior decisions sustaining waivers of trial by jury. In *Fidelity & Deposit Co. v. Krout* (C.C.A. 2, 1946), 157 Fed. (2d) 912, the pleadings had been amended to conform to proof. Defendants' attorney was given an opportunity of additional time to prepare his defenses but the offer was declined and an exception to permitting the amendment relied on. On appeal it was argued that the allowance of the amendment deprived the defendant of trial by jury. As to this argument, the Court said at page 914:

"The action as brought originally was triable by a jury and the amendment changed nothing in that respect. Failure to claim the right in

accordance with Rule 38(b), Federal Rules Civil Procedure, was a waiver under subdivision (d) of that rule.”

Another case that was cited is *May v. Melvin* (U.S.C.A., D.C., 1944), 141 Fed. (2d) 22, where the plaintiff had brought suit for alienation of affections. Plaintiff failed to demand a jury pursuant to Rule 38, and subsequently made such a demand about sixteen months after the defendant’s answer was filed. Plaintiff’s demand was denied and no request was made to the Court to set aside the waiver under Rule 39. A trial was had and the defendant recovered judgment. On appeal the plaintiff urged error because of being denied trial by jury. The Appellate Court affirmed, saying at page 22:

“Appellant offered no excuse except the ‘inadvertence’ of former counsel. Though the court might, in its discretion, have ordered a jury trial, it was under no obligation to do so.”

A third case that was cited is *William Goldman Theatres v. Kirkpatrick* (C.C.A. 3, 1946), 154 Fed. (2d) 66, where the petitioner sought mandamus to compel respondent judges to vacate an order referring petitioner’s suit, as plaintiff under the antitrust laws, against Loew’s, Inc., et al., to a special master and refusing petitioner a jury trial on the issue of damages. The suit was at issue on November 15, 1943, with no timely demand for jury being made thereafter. After a trial and an appeal which resulted in the Appellate Court remanding the case

to determine damages, the plaintiff had then petitioned that the trial as to damages be by jury. The petition was denied, with the matter being referred to the special master as hereinabove stated. On appeal the Court held at pages 68 et seq.:

“We come therefore to the second question, whether Judge Kirkpatrick’s refusal to grant the petitioner a jury trial on the issue of damages constituted an abuse of discretion.

* * * * *

It will be observed that under the rule the granting of a jury trial rests within the discretion of the district court.

* * * * *

We are of the opinion that the issue of damages may be disposed of more efficiently and more expeditiously by a trial to the court rather than by a trial by a jury. Consequently, we conclude that the learned District Judge did not commit a breach of discretion in denying the petitioner’s application for a jury trial.”

Also cited was *McNabb v. Kansas City Life Ins. Co.* (C.C.A.-8, 1943), 139 Fed. (2d) 591, which was a suit on contract. Plaintiff had not served demand for jury as required by Rule 38. Thereafter plaintiff demanded a jury but did not petition to set the waiver of jury trial aside. The demand for trial by jury was denied and the defendant prevailed in the ensuing trial. Plaintiff appealed, urging the denial of plaintiff’s demand for trial by jury as reversible error. The Appellate Court held otherwise, stating at page 595:

“Rule 38 (d) specifically provides that the failure of a party to serve the required demand constitutes a waiver by him of a trial by jury. Failure to serve such a demand is a legal waiver, *whether it is inadvertent or intentional.*” (Emphasis ours.)

The *McNabb* case appears to be a leading case and is cited and quoted at length in a number of cases, including *Baker v. General Motors Corp.* (U.S.D.C., Mich., 1950), 10 F.R.D. 512, where, in a patent infringement case, plaintiff had demanded a jury about sixteen months after the defendant's answer was filed and about six months after the case had been set for trial. Recognizing that the delay in itself did not deprive the Court of discretion to grant plaintiff's demand, the Court nevertheless denied the same (page 514) because “the ends of justice would be better served by not allowing a jury trial” in that type of case.

As shown by the quotation from the opinion of this Court, this Court also cited *Delno v. Market St. Ry. Co.* (C.C.A.-9, 1942), 124 Fed. (2d) 965, where the trial Court had exercised its discretion to dismiss a suit for declaratory relief brought by a disapproving bondholder after the Railroad Commission had approved a plan for refinancing the railroad which included reducing the interest rate and extending the maturity date of the bonded indebtedness five years. In affirming, this Court had occasion to define discretion and abuse of discretion at page 967:

“In a second sense, and the one most commonly meant in the use of the word in the law, ‘discretion’ is defined as: ‘The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.’ L. Bouv. Law Dict., Rawles’ Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be *final and cannot be set aside on appeal except when there is an abuse of discretion*. A common example is a court’s ruling on the extent of cross-examination. *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624. Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that *discretion is abused only where no reasonable man would take the view adopted by the trial court*. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” (Emphasis ours.)

Kass v. Baskin (U.S.C.A., D.C., 1947), 164 Fed. (2d) 513, appears to be another leading case on this subject. There suit was originally filed in the Municipal Court, District of Columbia, as a landlord-tenant problem, with the landlord recovering judgment. The appellate division of the Municipal Court reversed, and the United States Court of Appeals allowed an appeal. The rules of the Municipal Court require that a demand for jury “be filed not later than the time for appearance of the defendant” un-

less extended by the Court. Defendant's time for appearance was March 25, 1946. The defendant appeared and secured a continuance of the case for trial but did not demand a jury or request an extension of time for that purpose. *Four days later* defendant filed an answer and a motion for jury trial supported by an affidavit. The trial Court denied the motion, heard the case without a jury and gave the plaintiff judgment. Defendant's appeal followed, with the Appellate Court sustaining the trial judge, and saying at pages 515, et seq.:

"The affidavit of the attorney in this case shows nothing more than failure to observe the Rule.

* * * * *

The literal effect of non-compliance with the Rule is to remove trial by jury from among the rights of the parties and to place it within the sound discretion of the trial court.

* * * * *

We hold that if a party fails to observe the conditions of this clear and reasonable rule of court, it is not necessary, in order to apply the consequences of the rule to him, to show that he consciously intended to incur those consequences.

* * * * *

The recurrence of the problem makes advisable a clear and certain statement of the applicable rule. We hold that when a party has failed to comply with the requirements of the Rule in respect to demands for jury trial, and thereafter appeals to the court to grant such trial, the *matter lies within the sound discretion of the*

court. In exercising that discretion, the court may consider all elements pertinent to the interests of both parties and also to the general conduct of the business of the court. The sole exception, if any, to this general rule should be, as we have indicated, the case where uncontrollable circumstances prevent compliance with the terms of the Rule; there the right may perhaps be preserved.

Our present holding is consistent with our decision and opinion in *May v. Melvin*, where the same question was before us under Rule 38(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

* * * * *

We do not find that the trial judge abused his discretion in denying trial by jury when he found no circumstances indicating the advisability of such trial in the interest of justice.

* * * * *

Uncontrollable circumstances preventing compliance might perhaps preserve the right, but neglect, whether excusable or not, cannot." (Emphasis ours.)

In so holding, the Court also cited a number of the cases hereinabove discussed and cited by this Court. In addition there is cited *Kennedy v. David* (U.S.C.A., D.C., 1940), 109 Fed. (2d) 676, where a similar factual situation had occurred in the Municipal Court except that the delay in demanding the jury was just four days but more than one month after the time for the appearance of the defendant. Upon plaintiff's objection to trial by jury because

of the failure to make a timely demand, the Court denied the demand and, after trial, gave plaintiff judgment. In affirming the trial Court, the Appellate Court said at page 676:

“It has long been settled that a right to jury trial in a civil action may be waived by failure to comply with reasonable conditions.”

As did the *Kennedy* case, the *Kass* case also cited *Bank of Columbia v. Okely*, 17 U.S. 235, where the Court said at page 243:

“But a power is reserved to the judges to make such rules and orders ‘as that justice may be done;’ and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that ‘the trial by jury shall be preserved,’ it might have been contended that they were imperative, and could not be dispensed with. But the words are, that *the right of trial by jury shall be preserved*, which places it on the foot of a *lex pro se introducta*, and *the benefit of it may therefore be relinquished*.” (Emphasis ours.)

Also cited is *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, where the Court said at page 320:

“If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.”

Also cited is *Capital Traction Co. v. Hof*, 174 U.S. 1, where, in passing on the question of the statutes covering jury trial in Justice's Court in light of the Seventh Amendment, the Court said at page 22:

“While, as has been seen, the Seventh Amendment to the Constitution of the United States requires that ‘the right of trial by jury shall be preserved’ in the courts of the United States in every action at law in which the value in controversy exceeds twenty dollars, and forbids any fact once tried by a jury to ‘be otherwise re-examined, in any court of the United States, then according to the rules of the common law,’ meaning thereby the common law of England, and not the law of any one or more of the states of the Union, yet it is to be remembered that, as observed by Justice Johnson, speaking for this court, in *Bank of Columbia v. Okely*, above cited, it is not ‘trial by jury’, but ‘the right of trial by jury’, which the Amendment declares ‘shall be preserved.’ *It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consist-*

ently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several states are entitled to great weight, inasmuch as the Constitutions of all of them had secured the right of trial by jury in civil actions, by the words 'shall be preserved', or 'shall be as heretofore', or 'shall remain inviolate', or 'shall be held sacred', or by some equivalent expression." (Emphasis ours.)

Also cited is *Duignan v. United States*, 274 U.S. 195, where the Court said at page 199:

"Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed."

Also cited is *Yakus v. United States*, 321 U.S. 414, where the Court said at page 444:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Also cited is *Prince Line v. American Paper Exports* (C.C.A. 2, 1932), 55 Fed. (2d) 1053, where the Court said at page 1057:

"The respondent was bound at that time to claim its right to a jury, if it meant to insist upon it: for a jury trial is not in civil cases, a constitutional necessity; a defendant may lose it by inaction." (Emphasis ours.)

In an appeal from a conviction arising out of kidnapping where a question of jurisdiction was raised because the Sixth Amendment of the Constitution conferred on the accused the privilege of trial by jury of the district where the crime was committed, the Court, in *United States v. Strewl* (C.C.A. 2, 1938), 99 Fed. (2d) 474, pointed up the difference between waiver of a jury in a civil case by failure to make timely demand, and the requirement that in criminal cases a jury must be expressly waived by the accused, saying at page 478:

“That privilege may indeed be surrendered, because the privilege of any trial by jury whatever may be surrendered. *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263.

* * * * *

It is true that under rule 38(d) of the Rules of Civil Procedure for District Court, 28 U.S.C.A. following section 723c, he who does not seasonably demand a jury may not have one, whether he consents or not; and it is also true that the Seventh Amendment, U.S.C.A. Const. Amend. 7, protects that privilege, just as the Sixth protects it in a criminal case.”

As authority, the *Strewl* case cites *Patton v. United States*, 281 U.S. 276, where the Supreme Court said at page 299:

“Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that

the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions." (Emphasis ours.)

Where the plaintiff failed to make timely demand for trial by jury and subsequently a demand was denied with judgment being entered for the defendants following a Court trial, the Court, in *Missouri Pac. Transp. Co. v. George* (C.C.A.-8, 1940), 114 Fed. (2d) 757 (Certiorari Denied, 312 U.S. 681), held that the trial Court had not erred in denying plaintiff's motion for a jury trial, stating at page 758:

"Further, the record does not show that the plaintiff served its demand for a jury trial upon the other parties to the suit or that it indorsed such demand upon its pleadings as provided in Rule 38(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, subsection (d) of which rule provides that: 'The failure of a party to serve a demand as required by this rule * * * constitutes a waiver * * * of trial by jury.'"

Where the issue of the validity of a patent in an infringement case was tried without a jury and resulted in the defendant having judgment, and on appeal the plaintiff urged, among other grounds, that there was error in not trying the issue of validity before a jury, the Appellate Court in *Gasifier Mfg. Co. v. General Motors Corporation* (C.C.A.-8, 1943), 138 Fed. (2d) 197, said at page 199:

“The contention of the plaintiff that the court erred in not having the issue of invalidity tried by a jury, is without merit. The record does not show that there was any demand for a jury trial, and, under Rules 38(d) and 39(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, the case was properly tried as a jury-waived case.”

Where plaintiff sued for specific performance of a contract and “such other relief as the court may deem proper” and subsequently moved to amend the prayer of the complaint to include damages with the motion being denied, together with plaintiff’s subsequent motion to conform the pleadings to proof, resulting in the trial Court granting defendant’s motion for an involuntary dismissal, the Court, in *Gulbenkian v. Gulbenkian* (C.C.A.-2, 1945), 147 Fed. (2d) 173, said at page 176:

“Clearly the defendants had long been on notice of the plaintiff’s potential claim for damages. If jury trial was ever claimable, the defendants’ failure to claim it, whether intentionally or inadvertently, was a waiver.”

In *Roth v. Hyer* (C.C.A.-5, 1944), 142 Fed. (2d) 227 (Certiorari Denied, 323 U.S. 712), plaintiff sued for damages for breach of contract. Because of a failure to make timely demand for trial by jury, the case was tried by the Court who gave judgment to the defendants. On appeal a reversal occurred and the case was sent back for “further and not inconsistent proceedings”. At the second hearing defendants de-

manded a jury. The trial judge refused the demand, holding that nothing but the issue of damages remained. Damages were awarded with the Court rejecting the plaintiff's theory of damages. Both parties then appealed. The Appellate Court held that the defendant should have moved for a jury under Rule 39 since a jury had already been waived under Rule 38 in the first trial, saying at page 228:

"We accordingly hold that there was no error here on the retrial in refusing the demand for a jury trial. But it may happen that a judge on a retrial may think best to have a jury, and by Rule 39(b) in such a case *the Court in its discretion upon motion may order a trial by jury, though there is no longer a right to demand one.*" (Emphasis ours.)

The *Roth* case was subsequently cited in *Albert v. R. P. Farnsworth & Co.* (C.C.A.-5, 1949), 176 Fed. (2d) 198, which also involved a suit on a contract with the defendant failing to make a timely demand for a jury. Judgment went for the plaintiff and the defendant appealed, urging the denial of a jury trial as reversible error. The Appellate Court reversed on other grounds, stating as to the matter of a trial by jury at page 203:

"As to the motion for trial by jury, while the right to a jury in a federal court, as declared by the Seventh Amendment is a basic and fundamental feature of our system, we are of the opinion that, because of the lateness of the demand, denial was not error."

In *Abbe v. New York, N. H. & H. R. Co.* (C.C.A.-2, 1948), 171 Fed. (2d) 387, a personal injury action filed in the State Court had been removed to the Federal Court where the answer was filed on May 15, 1948. Short of a month the plaintiff was notified that the case had been placed on the nonjury calendar for trial and thereupon moved to transfer the case to the jury calendar. The motion was denied and an appeal followed. The Appellate Court held that the order was interlocutory and not appealable and that consequently the appeal had to be dismissed. Judge Learned Hand dissented, stating that he would favor considering the appeal as an application for a writ of mandamus, and in this connection said at page 389:

“On the merits the order ought to be affirmed, for it is clear on this record that the judge did not abuse the discretion given him by Rule 39(b).

In the following cases, a demand for trial by jury was stricken because the same had not been served within ten days after the last responsive pleading:

Steinhardt Novelty Co. v. Arkay Infants Wear
(U.S.D.C., N.Y., 1950), 10 F.R.D. 321, 323;

Reeves v. Pennsylvania R. Co. (U.S.D.C., Md., 1949), 9 F.R.D. 487, 488;

Bullock v. Sterling Drug (U.S.D.C., Pa., 1948), 8 F.R.D. 575;

Steiger v. Mullaney (U.S.D.C., N.Y., 1948), 8 F.R.D. 486;

Gora v. Jenkins Bros. (U.S.D.C., Conn., 1948),
8 F.R.D. 32;

Irvine v. Luckenbach Steamship Co. (U.S.D.C.
N.Y., 1946), 7 F.R.D. 127, 128.

A.

Unfamiliarity with Rule 38 is insufficient to set aside waiver of trial by jury.

Appellant asked the District Court to set aside her waiver of trial by jury because such waiver was "due to the inadvertence and mistake of affiant as plaintiff's counsel" (R. 25). In substance, the asserted inadvertence and mistake was in fact nothing more than unfamiliarity with the rules of procedure. In *State of Delaware v. Massachusetts Bonding & Ins. Co.* (U.S.D.C., Del., 1942), 3 F.R.D. 65, the Court held that unfamiliarity with the rules of procedure was insufficient grounds to require the setting aside of a waiver of trial by jury. Oddly enough, in that case the District Court first granted defendant's motion to set aside the waiver because the Court thought counsel's unfamiliarity was excusable since he "practices in a small community in one of the lower counties of this District, has never had a case in this Court and was unfamiliar with the Federal Rules of Civil Procedure", but on re-argument the order was set aside when it was shown that defendant's appearance was entered by "one of the well-known law firms of Wilmington", a fact not previously known to the Court, the Court saying at page 67:

“In short, in view of the new facts I have little, if anything, upon which to base an exercise of discretion in relieving defendants’ waiver of a trial by jury. Hence, their motion for jury trial is denied.”

In *MacDonald v. Central Vermont Ry., Inc.* (U.S. D.C., Conn., 1940), 31 Fed. Supp. 298, the Court said at page 299:

“I am also asked to rule upon the validity of the plaintiff’s claim of trial by jury. This claim was filed long after the time limited by Rule 38(b). The right to a jury trial was thus waived under Rule 38(d). The plaintiff, in effect, is seeking to withdraw his waiver. The only ground upon which plaintiff’s application is based is that in November, 1938, when the pleadings were closed, the plaintiff’s attorney was not familiar with the relevant provisions of the new rules and that the rules themselves were not readily available to him in published form.

But the plaintiff brought his action to this Court in October, 1938, after the new rules had become effective. Consequently, the limited exception for pending actions provided in Rule 86 is not applicable here. Certainly the new rules as promulgated and reported to Congress were available in October, 1938, in any reputable bar library. Altogether, even if in a proper case the court has power to relax the rigor of Rule 38(b) (a point which I find it unnecessary to decide) I must rule that the grounds upon which this application is based are inadequate. *One who invokes the jurisdiction of a federal court is charged with notice of the plain language of the rules regulating its procedure.*” (Emphasis ours.)

In *Krussman v. Omaha Woodmen Life Ins. Soc.* (U.S.D.C., Idaho, 1941), 2 F.R.D. 3, plaintiff's attorney failed to make timely demand "by reason of oversight". In refusing to set aside the waiver, the Court said at page 4:

"The Courts who have interpreted the rule where the discretion was exercised and motion for trial by jury was granted after the time to demand it has elapsed seem to be based upon a showing made disclosing some circumstances other than the bare oversight of counsel.

* * * * *

Should the motion be granted, it would have to be based merely on the simple request and nothing more. To do that the Court would be acting arbitrarily which it should not do, and therefore the motion of the plaintiff is denied."

In *Arnold v. Chicago, B. & Q. R. Co.* (U.S.D.C., Neb., 1947), 7 F.R.D. 678, plaintiff filed a personal injury action in the state Court and defendant removed the same, filing its answer in the Federal Court. As in the case at bar, a demand for trial by jury was not timely. In denying a subsequent demand, the Court commented on the difference between State and Federal practice and stated that such was not a sufficient reason to set aside the waiver of trial by jury, saying at pages 679, et seq.:

"If it be considered, in its literal form, as a demand as of right for a trial by jury upon the theory that the right exists because the case was filed originally in the Nebraska state court, it is without validity. It is unquestioned that the case

is one in which a trial by jury may be demanded in this court by timely action, and that, if it had not been removed from the state court, its trial there would have been had before a jury, unless both parties by stipulation had waived such trial. But those circumstances are not controlling upon the present question.

The case came here with only the petition filed. And the issues were matured in this court. In such situations Rule 81(c) is to be administered. It provides that, 'These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal.'

* * * * *

Thus by Rule 81(c), Rule 38, in its several subdivisions, becomes applicable to removed cases. And by Rule 38(b), in association with Rule 6(e), when service of the last pleading directed to the triable issue is by mail, the time within which a jury trial may be demanded is explicitly prescribed. The limitation there declared has not been observed in this instance.

* * * * *

It may be added that as a matter of judicial administration *judicial indulgence ought rarely to grant a trial by jury in default of a timely request for it*. Such laxity is calculated to inspire indifference to the requirements of the rules in their entirety, to countenance tardiness in procedural and trial performance, and ultimately to defeat the avowed purpose of the rules to achieve punctuality in the administration of justice. More immediately, it will inevitably create confusion in trial dockets and accomplish unanticipated and in-

tolerable continuances of trials. The consequences are uninviting.

An order is being entered denying the motion.”
(Emphasis ours.)

In *Bowles v. Samonas* (U.S.D.C., Pa., 1946), 7 F.R.D. 104, a complicated O.P.A. rent case was before the Court. The defendant had moved to set aside the waiver of trial by jury for the reason that counsel had assumed that the procedure in the Federal Court as to trial by jury in civil proceedings was the same as the practice in the State Courts and consequently, through inadvertence and mistake, was unaware that Rule 38 required that a timely demand for a jury be made. In passing on this matter, the District Court observed that when the rules first went into effect, at least one Court had held that the reason given by counsel was “excusable neglect”, citing *Albert Hoffmann, Inc. v. Textile Mach. Works*, 27 Fed. Supp. 431. The Court also noted that a contrary view had been expressed by other Courts, of which *MacDonald v. Central Vermont Ry. Inc.*, 31 Fed. Supp. 298, cited *supra*, is an example. Although the motion was granted on the grounds that the many factual issues made a jury trial advisable, the Court was careful to say that the granting of the motion was “not to be construed as a practice of this Court to make similar rulings where the reason advanced is that counsel * * * is not familiar with the rules”. Specifically the Court said at page 105:

“Although the Court realizes that members of the bar in outlying counties do not generally have

regular occasions to practice in Federal Court, when an attorney is admitted to practice before this Court, *he is charged with the responsibility to learn the rules of practice and procedure* and said rules are available in all law libraries.” (Emphasis ours.)

It would seem clear to appellee from the foregoing cases that the reason given by appellant in asking that the Court set aside appellant’s waiver of trial by jury is entirely insufficient since apparently it was due solely to appellant’s San Francisco counsel being unfamiliar with the Federal Rules in urging inadvertence and mistake. It is well established that in the absence of some compelling showing, unfamiliarity with Rule 38 is insufficient grounds for this Court to set aside a waiver of trial by jury especially where the District Court, in its discretion, has ruled otherwise.

B.

Appellant acquiesced to her day in Court without a jury.

Even if appellant could find some comfort in the authorities indicating that the District Court abused its discretion as a matter of law in refusing to set aside her waiver of trial by jury, the fact that appellant went to trial without demanding a jury at any time after her motion was denied would in itself constitute a final waiver precluding further relief following judgment in favor of appellee. In this connection, the Supreme Court said in *Duignan v. United States*, 274 U.S. 195, at page 198:

“The right to a jury trial may be waived where there is an appearance and participation in the

trial without demanding a jury. *Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395; *Perego v. Dodge*, 163 U.S. 160, 166, 41 L. ed. 113, 117, 11 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364.”

In *Smith v. Cushman Motor Works* (C.C.A.-8, 1950), 178 Fed. (2d) 953 (rehearing denied), a contract action was before the Court, the defense being that there was no contract. After the issues were framed, defendants apparently made a timely demand for a jury, with plaintiffs having made no such demand. When the case came on for trial the judge stated that the first question was whether there was a contract and this, being a question of law, was one for the Court rather than for a jury, following the determination of which it could be ascertained whether or not a jury was needed. Neither party objected to this ruling. The case proceeded as the Court directed and the Court found for the defendant, holding that there was no contract, and dismissing the jury. Plaintiffs appealed, urging reversible error in not submitting the contract question to a jury, there being no issue as to the sufficiency of the evidence to support the findings much as in the case at bar. In affirming, the Appellate Court said at page 954:

“The second assignment is that the court committed reversible error in failing to submit to a jury the issue as to the existence of the contract sued on. The answer is that the appellants not only never demanded a jury as required by Rule 38 of the Federal Rules of Civil Procedure. 28 U.S.C.A., but *consented to a trial of the case before the court*, as also did the appellee. Appellants do not argue that the findings of fact of the

trial judge concerning the existence of the contract sued on were clearly erroneous under Rule 52 of the Rules of Civil Procedure. On the contrary, *they take no exceptions to any of the findings* by the trial court; but, admitting that the question of whether there was a contract was a question of fact on which the evidence was in dispute, they insist that the court should have submitted that issue to a jury. *Appellants having waived a trial by a jury are in no position now to complain that the court decided against them* the question submitted to it.

The judgment of the District Court is affirmed.”
(Emphasis ours.)

In *Fireman's Ins. Co. of Newark v. Smith* (C.C.A.-8, 1950), 180 Fed. (2d) 371 (rehearing denied; certiorari denied, 339 U.S. 980), the trial Court called a jury on its own motion for an advisory verdict on equitable issues. The parties engaged in the trial without objection as to the calling of a jury. The defendants recovered judgment. Plaintiff urged on appeal that the trial Court had erred in calling a jury on its own motion over plaintiff's objection. As to this the Appellate Court said at page 375:

“It follows that the court did not err in calling an advisory jury. It also follows that appellant cannot be heard to complain because it in effect agreed to trial by an advisory jury in that it saved no objection to the jury, but acquiesced in the procedure.”

Likewise, in *Hargrove v. American Cent. Ins. Co.* (C.C.A.-10, 1942), 125 Fed. (2d) 225, where the ac-

tion was one for declaratory judgment on a policy, neither party demanded a jury and the Court impaneled an advisory jury with neither party objecting. Also without objection the Court submitted certain interrogatories to the jury which were answered. Thereafter the Court disregarded the jury's verdict and made independent findings, stating that the verdict of the jury was advisory only and so considered by the Court. On appeal it was urged that the Court erred in impaneling an advisory jury and in this connection the Court said at page 229:

"The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain."

Appellant apparently concedes that, prior to the adoption of the Rules of Civil Procedure, a party litigant could voluntarily waive trial by jury by proceeding to trial before the Court without objection for the reason that such constituted a conscientious, intentional and voluntary waiver on the part of the party in question. (A.O.B. 11-17.) We have seen from the foregoing cases that, since the adoption of such rules, the Courts still regard proceeding to trial before the Court alone and without objection as constituting a waiver of trial by jury. In other words, the Rules of Procedure have in no way changed the well-established rule in this regard. Appellant acquiesced to her day in Court without a jury.

C.

The authorities do not support appellant.

Appellant has cited no case, and we have found none, where the District Judge in the exercise of sound discretion refused to set aside a waiver of trial by jury with the Appellate Court reversing because of alleged abuse of discretion. But that is exactly what appellant is asking this Court to do on a record clearly showing no abuse of discretion and with numerous cases holding otherwise as hereinabove cited.

Appellant cites six cases where, without exception, for some special reason the *District Judge in his discretion set aside the waiver of trial by jury*. In *Sofarelli Bros. v. Elgin* (C.C.A.-4, 1942), 129 Fed. (2d) 785 (A.O.B. 18), the case had been removed from the state Court, following which the plaintiff failed to demand a jury. However, at the time of trial the judge exercised his discretion in favor of granting a jury trial on plaintiff's motion for the same. Apparently plaintiff had made a written request to the clerk for a jury trial and the letter so requesting had been lost. Also, ten days before trial, during an argument on the taking of a deposition the matter of a jury trial was mentioned. At any rate, over defendant's objection, the trial judge saw fit to call a jury rather than deny one, and the Appellate Court affirmed, holding that although there was no formal compliance with Rule 38, the rule had been complied with in spirit and the trial judge did not err in exercising his discretion to allow a jury.

In *Container Co. v. Carpenter Container Corp.*, 9 F.R.D. 261 (A.O.B. 18), the District Judge set aside a waiver because of "excusable neglect" arising out of failure to demand a jury within time and prior to the separation for trial of a non-jury patent matter from anti-trust issues raised in a counterclaim, the plaintiff desiring a jury trial of the latter.

In *Paper Stylists, Inc. v. Fitchburg Paper Co.*, 9 F.R.D. 4 (A.O.B. 18), again the District Judge allowed a jury trial due "to the peculiar circumstances involved" arising out of a "maze of legal procedure" causing plaintiff to lose sight of the time within which to demand a jury.

Again, in *Ferris v. Farnsworth Television & Radio Corp.*, 8 F.R.D. 489 (A.O.B. 18), plaintiff had demanded a jury in the state Court before removal, clearly evidencing an intention not to waive the same, and then neglected to repeat such demand thereafter. The District Judge set aside an apparent waiver, not because plaintiff had any right to a trial by jury in the opinion of the Court, but, in the exercise of the Court's discretion, the Court felt that the failure to make timely demand was excusable in view of the demand previously filed in the state Court.

Where similar facts were presented in *Wardrop v. New York Life Ins. Co.*, 1 F.R.D. 175 (A.O.B. 19), a similar ruling was handed down by the District Judge, holding that it was not necessary to repeat the demand made in the state Court prior to removal. It should be noted in passing that nothing would have prevented appellant from endorsing such a demand

on her complaint when she filed it in the state Court knowing that she was suing and serving a foreign corporation which was entitled to remove the case to the Federal Court.

Again in *Gruskin v. New York Life Ins. Co.*, 1 F.R.D. 22 (A.O.B. 19), plaintiff brought suit in the state Court where right of trial by jury existed without demand—unlike our own state Court practice where a jury must be demanded when filing a memorandum to set the case for trial or it is waived by the party filing the memorandum. On removal, counsel failed to make a timely demand in the Federal Court. The District Judge set aside the waiver because, in the opinion of the Court, counsel did not realize that the Rules of Civil Procedure which “had not been in operation for a long period”, replaced the state rules, otherwise, “the delay in the instant case was such as to preclude the Court from exercising its discretion in favor of the motion”.

There is no case holding that where the District Judge refuses, in his discretion, both before and after a Court trial, to act to set aside a waiver of trial by jury, such in itself constitutes reversible error. There must be a showing of an abuse of that discretion. There has been no such showing in this case.

CONCLUSION.

Not only was there no error in the refusal of the District Court to set aside appellant's waiver of trial by jury, but, in addition, the record shows that appel-

lant could not have been prejudiced because she failed to prove her case, requiring that a motion for involuntary dismissal be granted to withdraw the case from the trier of the facts. The record also shows no compelling reason in law or in fact why the Court below should have granted appellant's motion to set aside the waiver of trial by jury. We contend that reversible error has not been committed and that the judgment of the lower Court should be affirmed.

Dated, San Francisco, California,

October 8, 1951.

Respectfully submitted,

HADSELL, MURMAN & BISHOP,

SYDNEY P. MURMAN,

RICHARD S. BISHOP,

Attorneys for Appellee.

1870. The first of these was the discovery of the
 fact that the temperature of the water in the
 lake was not uniform, but that it was
 warmer in some places than in others.

This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.
 This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.

The second of these was the discovery of the
 fact that the temperature of the water in the
 lake was not uniform, but that it was
 warmer in some places than in others.

This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.
 This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.

The third of these was the discovery of the
 fact that the temperature of the water in the
 lake was not uniform, but that it was
 warmer in some places than in others.

This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.
 This was due to the fact that the water in the
 lake was not mixed, but that it was
 warmer in some places than in others.

The fourth of these was the discovery of the
 fact that the temperature of the water in the
 lake was not uniform, but that it was
 warmer in some places than in others.

No. 12,975

IN THE

United States Court of Appeals
For the Ninth Circuit

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

ROBERT H. JOHNSON,

703 Market Street, San Francisco 3, California,

FILED

Attorneys for Appellant.

JUN 19 1951

PAUL P. O'BRIEN
CLERK



Subject Index

	Page
I. Introduction	1
II. Answering appellee's statement of the case (A.R.B., 1-4)	2
III. Answering appellee's contention I that appellant's case lacked merit (A.R.B., 5-21)	2
IV. Answering appellee's contention II that the discretion of the District Court in refusing to set aside waiver of trial by jury was not abused (A.R.B., 21-41)	4
V. Answering appellee's contention A that unfamiliarity with Rule 38 is insufficient to set aside waiver of trial by Jury (A.R.B., 41-46)	10
VI. Answering appellee's contention B that appellant acquiesced in her day in court without a jury (A.R.B., 46-49)	12
VII. Answering appellee's contention C that the authorities do not support appellant (A.R.B., 50-52)	12
VIII. Conclusion	13

Table of Authorities Cited

Cases	Pages
Abbe v. New York, N. H. & H. R. Co., 171 F. (2d) 387.....	3, 10, 12
Albert v. R. P. Farnsworth & Co., 176 F. (2d) 198.....	8, 9
Arnold v. Chicago, B. & Q. R. Co., 7 F.R.D. 678.....	11
Arnstein v. 20th Century Fox Film Corp., 3 F.R.D. 58....	7
Baker v. General Motors Corp., 10 F.R.D. 512.....	8
Bank of Columbia v. Okely, 17 U.S. (4 Wheaton) 235, 4 L.ed. 559	8
Baylis v. Travelers' Ins. Co., 113 U.S. 316, 28 L.ed. 989.....	2, 12
Bouis v. Aetna Casualty & Surety Co., 98 Fed. Supp. 176...	7
Bowles v. Samonas, 7 F.R.D. 104.....	11
Bullock v. Sterling Drug, 8 F.R.D. 575.....	8
Capital Traction Co. v. Hof, 174 U.S. 1, 43 L.ed. 873.....	9
Delno v. Market St. Ry. Co., 124 F. (2d) 965.....	9
Duignan v. United States, 274 U.S. 195, 71 L.ed. 996.....	7, 8
Etelson v. Metropolitan Life Ins. Co., 137 F. (2d) 62.....	7
Fidelity & Deposit Co. v. Krout, 157 F. (2d) 912.....	8
Fidelity & Deposit Co. v. United States, 187 U.S. 315, 47 L.ed. 194	9
Fitzpatrick v. Sun Life Assur. Co. of Canada, 1 F.R.D. 713	7
Glasifier Mfg. Co. v. General Motors Corp., 138 F. (2d) 197	8
Gora v. Jenkins Bros., 8 F.R.D. 321.....	7
Guebenkian v. Guebenkian, 147 F. (2d) 173.....	8
Hargrove v. American Cent. Ins. Co., 125 F. (2d) 225.....	7, 8
Johnson v. Gardner, 179 F. (2d) 114.....	8
Kennedy v. David, 109 F. (2d) 676.....	8
Krussman v. Omaha Woodmen Life Ins. Soc., 2 F.R.D. 3....	11
MacDonald v. Central Vermont Ry., Inc., 31 Fed. Supp. 298	11
May v. Melvin, 141 F. (2d) 22.....	8

TABLE OF AUTHORITIES CITED

iii

	Pages
McNabb v. Kansas City Life Ins. Co., 139 F. (2d) 591.....	7
Missouri Pac. Transp. Co. v. George, 114 F. (2d) 757.....	8
Patton v. United States, 281 U.S. 276, 74 L.ed. 854.....	9
Pearson v. Yewdall, 95 U.S. 294, 24 L.ed. 436.....	6
Prince Line v. American Paper Exports, 55 F. (2d) 1053...	8, 9
Reeves v. Pennsylvania R. Co., 9 F.R.D. 487.....	8
Roth v. Hyer, 133 F. (2d) 5.....	8
Roth v. Hyer, 142 F. (2d) 227.....	8
State of Delaware v. Massachusetts Bonding & Ins. Co., 3 F.R.D. 65	10
Steiger v. Mullaney, 8 F.R.D. 486.....	7
Steinhart Novelty Co. v. Arkay Infants Wear, 10 F.R.D. 321	7
United States v. Strewl, 99 F. (2d) 474.....	7
Victor Talking Machine Co. v. George, 105 F. (2d) 697....	4, 12
William Goldman Theaters v. Kirkpatrick, 154 F. (2d) 66..	8
Yakus v. United States, 321 U.S. 414, 88 L.ed. 834.....	9

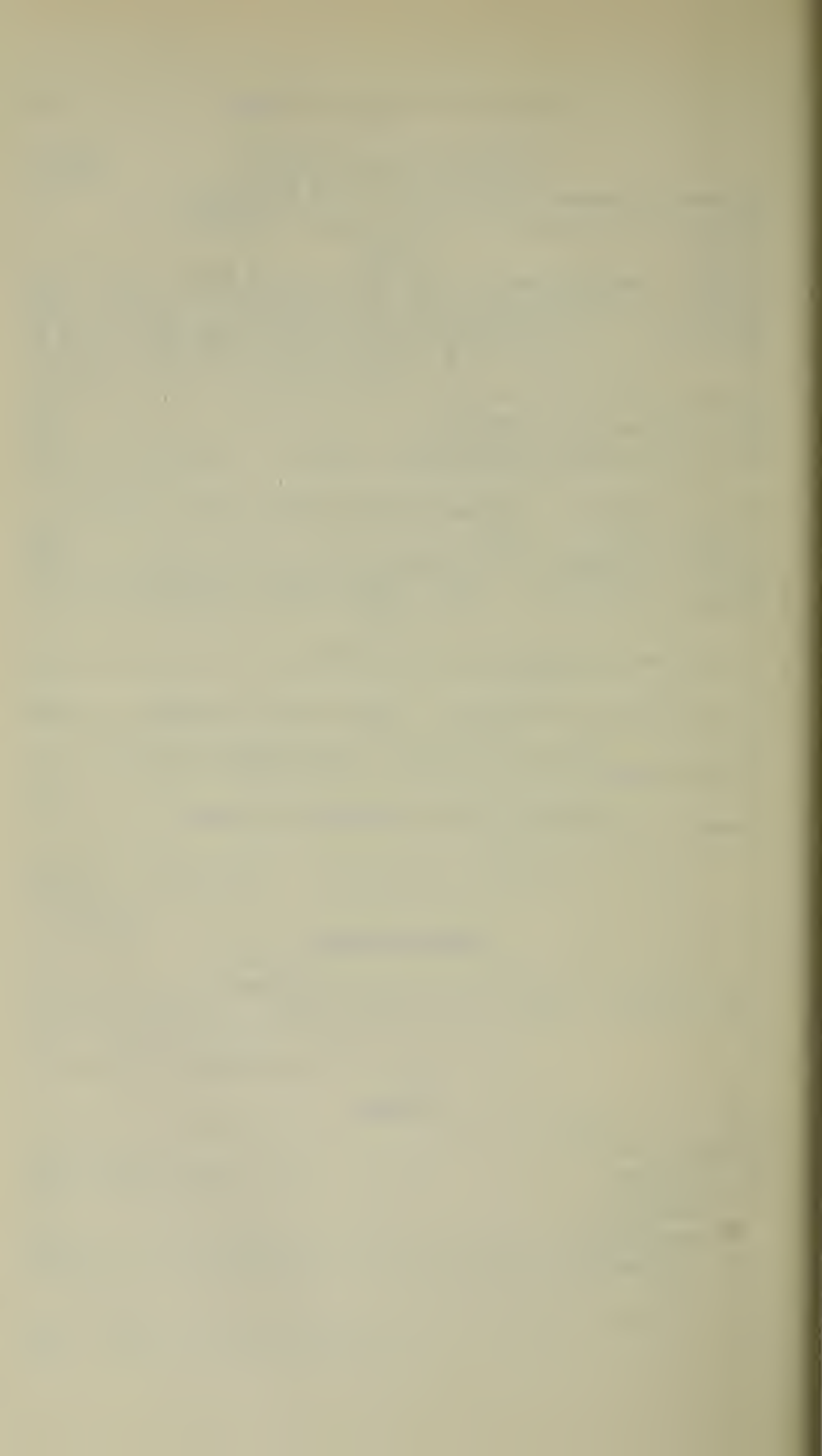
Constitutions

United States Constitution, Seventh Amendment.....	1
--	---

Rules

Rules of Court :

Rule 38	4, 5, 6, 7, 10
Rule 38(b)	11
Rule 38(d)	1, 7
Rule 39(b)	9, 11



No. 12,975

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

I. INTRODUCTION.

Appellee has failed to make even a pretense at answering the crux of appellant's argument on this appeal, namely, that if Rule 38(d) is to be construed as defining a "waiver" of trial by jury to eliminate the element of intentional and voluntary relinquishment of the right to jury, it is contrary to the Seventh Amendment. (A.O.B., 11-17.) The cases cited by appellant on this constitutional point stand wholly uncontradicted.

Appellee has rather chosen to pad its brief with matter irrelevant to this appeal. (Note pp. 5-21 inclusive.) It has chosen not to follow the order found in appellant's opening brief, since to do so would have

highlighted its omission to answer the constitutional issue and authorities. In this reply, however, we will for the convenience of the Court follow the order of appellee's brief being answered.

II. ANSWERING APPELLEE'S STATEMENT OF THE CASE. (A.R.B., 1-4.)

We detect no quarrel with the sequence or accuracy of facts as set forth (A.O.B., 2-4) and especially those regarding the removal to the federal Court. The time to demand jury had expired prior to defendant's opposition to remand being filed.

Appellee alleges that "appellant had her day in Court" (A.R.B., 1-4), inferring that by now demanding a jury she is taking some kind of unfair advantage of appellee. This merely begs the question; her "day in Court", guaranteed by the Constitution, was *a day with a jury*; in opposing appellant's original motion for a jury appellee induced the Court to deprive her of that right. Re-trial is just and proper when a jury is erroneously withheld. *Baylis v. Travelers' Ins. Co.*, 113 U.S. 316, 28 L.ed. 989.

III. ANSWERING APPELLEE'S CONTENTION I THAT APPELLANT'S CASE LACKED MERIT. (A.R.B., 5-21.)

The nub of appellee's 16 pages of argument on the *merits* (pp. 5-21) which is irrelevant to the issues on this appeal and which obviously was inserted to becloud the true issue, is to be found in the assertion

contained in the last paragraph, bottom of page 20, that plaintiff failed to prove the charging part of her complaint and therefore had no case against the appellee, hence was not prejudiced through the denial of a jury.

The answer to this tenuous argument is short, simple and devastating: plaintiff had made out a *prima facie* case and defendant's motion for a nonsuit was denied. (Tr. 41-2; 44.) This raised a question of fact upon which plaintiff was entitled under the Constitution to have a jury. That right could not be satisfied in the absence of waiver by having a judge instead of a jury pass on the factual issue.

Appellee's repeated assertion that appellant "now wants a new trial because the trier of facts who found against her was a District Judge and not a jury" (A.R.B., 5), intimates that appellant deliberately planned a Court trial so she could claim a second trial before a jury should she lose before the Court, all to the prejudice of appellee. Nothing could be more false; appellant has consistently sought jury trial from the beginning and submitted to Court trial only after her motion for jury was overruled due to appellee's vigorous opposition. Appellee itself quotes authority that the interlocutory order denying jury was not appealable. (*Abbe v. New York, N. H. & H. R. Co.*, 171 F. (2d) 387.) Even in cases where a statutory appeal lies from an interlocutory order (as it does not here) no prejudice can result from a failure to elect such appeal rather than appealing from the judgment. (*Victor Talking Machine Co. v. George*,

105 F. (2d) 697, 699.) In truth, if blame there be for two trials, it lies squarely on the appellee who prevented jury trial in the first place over the objections of appellant.

IV. ANSWERING APPELLEE'S CONTENTION II THAT THE DISCRETION OF THE DISTRICT COURT IN REFUSING TO SET ASIDE WAIVER OF TRIAL BY JURY WAS NOT ABUSED. (A.R.B., 21-41.)

Examination of the decisions cited and quoted by appellee proves them to be not in point in that they do not consider the questions pertinent to this appeal. Many merely rely on Rule 38 as authority for the statement that failure to make demand for jury within the 10 days constitutes waiver. To cite them here, where the rule itself is challenged, is to lift oneself by his own bootstraps by classical circular reasoning.

Other cases cited were equity actions involving accountings and the like, or involved "advisory" juries only. Or we find that the passage of great lengths of time (up to two years), or intervening events prejudicing opponent or Court, or even the actual unequivocal statements of counsel that no jury was desired by the client, all indicate clearly that the statements quoted by appellee from such cases are not pertinent to the present set of facts.

Many of appellee's quotations are directed to false issues, and "prove" only what is clearly the law and naturally accepted as such by us. Thus the citations as to the effect that right to jury *can* be waived, *can*

be lost by inaction, *can* be lost by failure to make timely demand, etc., are straining to make a point already made by us in our opening brief. Conceding that it *can* be waived, and that the Court *can* accept such a waiver, the real problem is *was* it waived; this raises the issue of *what constitutes* a waiver. And at this point the shallow treatment by appellee becomes evident. Examination of the cases cited by appellee emphasizes that the Courts simply have not gone into the question here presented.

It should be here emphasized that appellee *cites no case whatever*, and we know of none, where the Court tests the "waiver" of Rule 38 against the essentials of a true waiver; all have been content to let the rule stand on its own merits in that regard and accept it as a "waiver" solely because the rule so terms it. However, we find that in practically all of the cases involving the point of waiver under Rule 38, a true waiver exists under the facts showing voluntary and knowing acts of relinquishment or facts from which the same was fairly inferred under the pre-rule cases. This has made it unnecessary for the Courts to really critically examine Rule 38 as to whether it violated the Seventh Amendment.

Appellee cites the notes of the Advisory Committee on Rules (A.R.B., 21-22), but this merely emphasizes the fact that under appellee's theory and that applied by the trial Court the safeguard of the Seventh Amendment was circumvented by Rule 38. State practice cited is of questionable help and clearly led the committee astray. It overlooked that the Seventh

Amendment applies only to federal Courts, not to state Courts. (*Pearson v. Yewdall*, 95 U.S. 294, 24 L.ed. 436, 437.)

Appellee quotes an extract from 23 Marq. L. Rev. 159 appearing in the commentaries to Rule 38, which overlooked *Pearson v. Yewdall*, supra, and similar cases. (A.R.B., 22.) Appellee carefully refrained, however, from quoting other law reviews preceding the Marquette extract in the commentaries. We briefly supply part of this deficiency:

“ ‘It would seem that reference to state law to determine the right to trial by jury is clearly improper, not only on the theory that this is a federal constitutional question to be decided on the authority of federal cases, but also on the accepted conflict of laws doctrine that for choice of law purposes the right of trial by jury is a procedural matter.’ 1941, 16 St. John’s L. Rev. 44
* * *

“ ‘The right to trial by jury according to the rules of the common law as directed in the Enabling Act [Section 723c of this title] is of course preserved, but a method of waiver of jury trial has been provided for—an innovation in federal practice. * * * The purpose of the implied waiver was to protect judgments on defective special verdicts, and not to deprive litigants of trial by jury. * * *’ 24 Minn L. Rev. 1.”

Appellee then quotes numerous cases to the general effect that basic issues formerly triable as of right are still triable as of right under Rule 38. These cases lead directly up to the question in issue in

this appeal—then stop short before it without examining the rule as applied *here* to deprive a litigant of her constitutional right. *We invite the honorable Circuit Court to test the instant facts by any recognized definition of waiver excepting only the arbitrary one found in Rule 38(d). Only by a play on words can appellant's conduct be termed a waiver.*

In short, examination of the cases urged by appellee will show that the quoted phrases were merely general statements *assuming* Rule 38 to be *valid without questioning its constitutionality in any way*: *Etelson v. Metropolitan Life Ins. Co.*, 137 F. (2d) 62; *United States v. Strowl*, 99 F. (2d) 474 (failing to support the statement for which cited A.R.B., 36, and citing only a pre-F.R.C.P. case); *Hargrove v. American Cent. Ins. Co.*, 125 F. (2d) 225; *Bouis v. Aetna Casualty & Surety Co.*, 98 Fed. Supp. 176 (being not here in point as timely demand was clearly made); *McNabb v. Kansas City Life Ins. Co.*, 139 F. (2d) 591; *Steinhart Novelty Co. v. Arkay Infants Wear*, 10 F.R.D. 321; *Steiger v. Mullaney*, 8 F.R.D. 486 (no facts given, basis of discretion therefore unknown); *Gora v. Jenkins Bros.*, 8 F.R.D. 321 (no facts given but Court states no excuse given). Or involving an equitable, not common law, cause of action: *Arnstein v. 20th Century Fox Film Corp.*, 3 F.R.D. 58; *Fitzpatrick v. Sun Life Assur. Co. of Canada*, 1 F.R.D. 713; *Duignan v. United States*, 274 U.S. 195, 71 L. ed. 996; *McNabb v. Kansas City Life Ins. Co.*, *supra* ("doubtful" whether any jury ques-

tion existed); *Missouri Pac. Transp. Co. v. George*, 114 F. (2d) 757; *Guebenkian v. Guebenkian*, 147 F. (2d) 173. Or involving a *real, conscious and voluntary* waiver by conduct or failure to demand jury for several months or at all, usually to the prejudice of the Court and adverse party: *Kennedy v. David*, 109 F. (2d) 676; *Bank of Columbia v. Okely*, 17 U.S. (4 Wheaton) 235, 4 L.ed. 559; *Duignan v. United States*, 274 U.S. 195, 71 L.ed. 996; *Prince Line v. American Paper Exports*, 55 F. (2d) 1053 (no demand, even on appeal); *Hargrove v. American Cent. Ins. Co.*, 125 F. (2d) 225; *Johnson v. Gardner*, 179 F. (2d) 114 (9 months late; attorney admitted no jury intended); *Fidelity & Deposit Co. v. Krout*, 157 F. (2d) 912 (jury first requested at 2nd trial); *May v. Melvin*, 141 F. (2d) 22 (4 months late; jury first demanded at pretrial); *William Goldman Theaters v. Kirkpatrick*, 154 F. (2d) 66 (jury first demanded two years late at 2nd trial; counsel stated omission deliberate); *Baker v. General Motors Corp.*, 10 F.R.D. 512 (16 months late; 6 months after set for trial; attorney indicated omission deliberate); *Glasifier Mfg. Co. v. General Motors Corp.*, 138 F. (2d) 197 (no demand ever made); *Roth v. Hyer*, 142 F. (2d) 227 (no appeal on jury point after first trial—see *Roth v. Hyer*, 133 F. (2d) 5); *Albert v. R. P. Farnsworth & Co.*, 176 F. (2d) 198 (jury demanded at pretrial less than month before trial); *Reeves v. Pennsylvania R. Co.*, 9 F.R.D. 487 (year late, no reason given); *Bullock v. Sterling Drug*, 8 F.R.D. 575 (over three months late, party “agreed” jury waived). Or involving the raising of an issue

giving rise to right to jury: *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 47 L.ed. 194 (if no issue made, no right to jury). Or involving merely the timing of jury trial: (*Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873 (no constitutional requirement for jury before justice of the peace so long as litigants accorded as of right an appeal therefrom and trial by jury in trial *de novo*). Or holding that the matter was properly submitted to the jury: *Yakus v. United States*, 321 U.S. 414, 88 L.ed. 834. Or being decided prior to adoption of the rule, being therefore confined obviously to holding on basis of a true waiver: *Prince Line v. American Paper Exports*, 55 F. (2d) 1053; *Patton v. United States*, 281 U.S. 276, 74 L.ed. 854.

Appellee quotes *Albert v. R. P. Farnsworth & Co.*, supra, at page 39, A.O.B., but omitted the next sentence of the text which reads as follows: "We are of the further opinion, however, that if upon remand the discretion of the Court is invoked under Rule 39(b) by a timely motion for jury trial, the Court may, *and in the absence of strong and compelling reasons should*, grant the motion." (Emphasis supplied.) This, we believe to be typical of the practice of appellee in its brief to distort the meaning of its quotations by removing them from context and ignoring the distinguishing factors involved.

Appellee quotes two other cases in this section that should be mentioned. *Delno v. Market St. Ry. Co.*, 124 F. (2d) 965 (A.R.B., p. 30), concerns itself with abuse of discretion only and does not contradict

appellant's position as stated. (A.O.B., 6-11.) *Abbe v. New York, N. H. & H. R. Co.*, 171 F. (2d) 387, confirms our position that no appeal from denial of jury lay until after final judgment. Appellee quotes the dissent of Judge Hand; the majority refused to go along with him on the matter.

V. ANSWERING APPELLEE'S CONTENTION A THAT UNFAMILIARITY WITH RULE 38 IS INSUFFICIENT TO SET ASIDE WAIVER OF TRIAL BY JURY. (A.R.B., 41-46.)

As throughout its brief, appellee ignores the effect of unconstitutionality of Rule 38, its argument being only directed to the question of abuse of discretion. Even so, it is unable to produce any authority higher than a District Court opinion. Appellee also ignores the distraction caused by the removal and remand proceedings in the instant case. Again we consider briefly the cases advanced by appellee:

In *State of Delaware v. Massachusetts Bonding & Ins. Co.*, 3 F.R.D. 65, the only excuse advanced was that counsel was unfamiliar with the rules. On rehearing this was shown to be false, and the decision naturally reversed. (In contrast, the affidavit of Mr. Johnson in the instant action (Tr. 24) stands alone and unchallenged to this date. Our facts are therefore like those of the original decision, not the rehearing.) The Court also indicated that "where application for jury trial under Rule 39(b) was refused, it appears there was some reason for the denial in addition to the waiver by failure to make demand pur-

suant to Rule 38(b)”, * * * “Each application under Rule 39(b) must be examined in the light of the particular facts of the case.”

In *MacDonald v. Central Vermont Ry., Inc.*, 31 Fed. Supp. 298, the claim for jury was made “long” after time had expired. The words italicized by appellee (A.R.B., bottom p. 42) emphasize the inapplicability of the holding as here the *appellee*, not appellant, “invoked the jurisdiction of the federal court”, confusing appellant by the removal and remand proceedings.

An ironic note appears in the refusal of the district judge to rule on whether the rigor of Rule 38(b) could be relaxed, the Court itself being evidently unaware of Rule 39(b) which is not cited. When even the Court occasionally overlooks a rule litigants should not be deprived of fundamental rights for similar occasional short-term omissions.

In *Krussman v. Omaha Woodmen Life Ins. Soc.*, 2 F.R.D. 3, no affidavit of any kind was filed, and the Court therefore had nothing in its discretion to consider. Here the reverse is true, there is no counter-affidavit to contradict the affidavit filed on behalf of appellant. (Tr. 24.) There is therefore no basis on which to disregard the affidavit and deny jury trial.

In *Arnold v. Chicago, B. & Q. R. Co.*, 7 F.R.D. 678, no demand for jury was ever made, nor was the failure to do so ever explained.

Bowles v. Samonas, 7 F.R.D. 104, typically involved a six-months-late demand made four days before the

trial date. Prejudice to Court and opponent are obvious, and the facts completely unlike those in the instant case.

In short, the decisions in the cases cited by appellee were shaped by the facts of the individual actions; facts in each case completely different from those of the case at bar.

VI. ANSWERING APPELLEE'S CONTENTION B THAT APPELLANT ACQUIESCED IN HER DAY IN COURT WITHOUT A JURY. (A.R.B., 46-49.)

Appellee's citation of advisory jury cases are not in point. Nor does one single opinion cited involve a demand made prior to trial. Appellant's rights here, however, were preserved by motion prior to setting, and redress is properly sought by this appeal. *Baylis v. Traveler's Ins. Co.*, 113 U.S. 316, 28 L.Ed. 989; *Abbe v. New York, N. H. & H. R. Co.*, 171 F. (2d) 387; *Victor Talking Machine Co. v. George*, 105 F. (2d) 697, 699. To state that appellant has had her "day in court" is to reason in a circle, as discussed *supra* in Section II of this brief.

VII. ANSWERING APPELLEE'S CONTENTION C THAT THE AUTHORITIES DO NOT SUPPORT APPELLANT. (A.R.B., 50-52.)

Appellant cited 28 cases in her opening brief. Appellee here pretends to answer but 6 of them. We are satisfied that the decisions stand for the propositions for which they were cited.

VIII. CONCLUSION.

In conclusion we refer to our opening brief which clearly outlines the issues on this appeal and briefly covers the pertinent authorities. Appellee has failed to answer it in a brief twice as long, nor even to *pretend* to answer the constitutional question advanced. Comparison of the facts of the instant case with those cited by appellee on the issue of abuse of discretion serves but to emphasize the abuse that here occurred. The Court erred in denying appellant's motions and judgment should be reversed and trial by jury ordered.

Dated, San Francisco, California,
October 17, 1951.

Respectfully submitted,
J. EDWARD JOHNSON,
W. G. HARMON,
WILLIAM H. HENDERSON,
ROBERT H. JOHNSON,
Attorneys for Appellant.

The first part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language. The second part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language.

The third part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language. The fourth part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language.

The fifth part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language. The sixth part of the paper discusses the importance of the study of the history of the English language. It is shown that the history of the English language is a very complex and interesting subject, and that it is one of the most important branches of the study of the English language.

No. 12,977

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN WALDON,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney.

422 Post Office Building, San Francisco 1, California.

Attorneys for Appellee.

FILED

NOV 24 1954

RECEIVED
Clerk



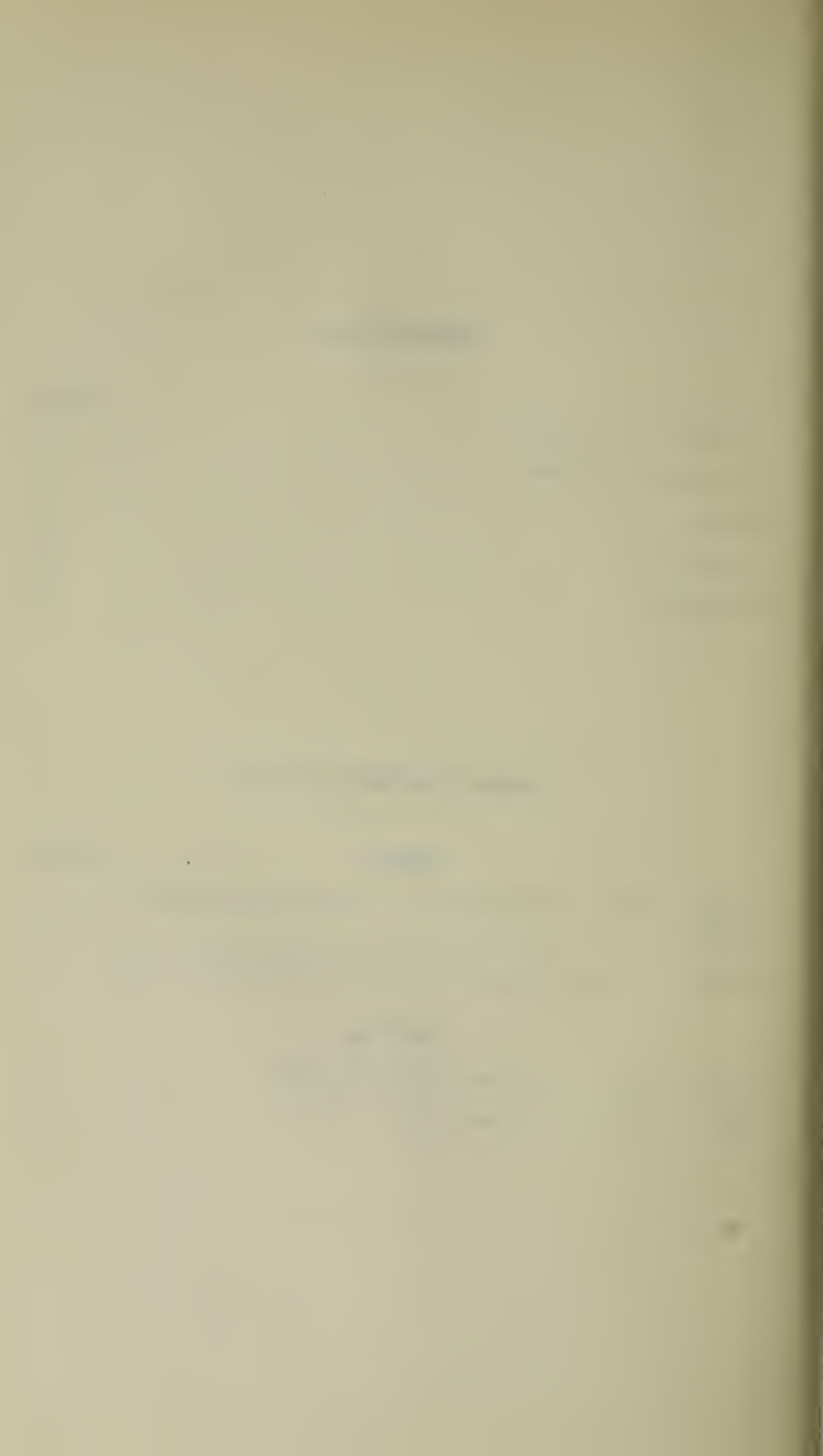
Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Issues	3
Argument	4
Conclusion	4

Table of Authorities Cited

Cases	Pages
Waldon v. Swope, 184 F. (2d) 185, certiorari denied 340 U.S. 912	2, 4
Waldon v. United States (E. Dist. Ill.), 84 Fed. Supp. 449..	2

Statutes	
Title 28 U.S.C.A., Sections 2241, 2243, 2255	1
Title 28 U.S.C.A., Section 2253	1



No. 12,977

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 25.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28, U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

STATEMENT OF THE CASE.

This is the second petition for writ of habeas corpus which the appellant has unsuccessfully urged in the Court below. On appeal from the order denying the first petition, Dist. Ct. No. 29233-E, this Honorable Court in deciding adversely to appellant filed the following brief opinion:

“This appeal is from an order denying a petition for a writ of habeas corpus. The order is affirmed. See *United States v. Waldon*, 7 Cir., 114 F. 2d 982; *Waldon v. United States*, 312 U.S. 681; *Id.*, 324 U.S. 847, 889; *Id.*, D.C.E.D. Ill., 84 F. Supp. 449.”

Waldon v. Swope, 184 F. (2d) 185; certiorari denied 340 U.S. 912.

The facts leading up to filing of these petitions and the contentions alleged therein are substantially set forth in the memorandum opinion of the Trial Judge, the Honorable Walter C. Lindley, denying appellant's motion to vacate his judgment and sentence.

Waldon v. United States (E. Dist. Ill.), 84 Fed. Supp. 449.

When the appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed the instant petition for writ of habeas corpus (Tr. 1-24) the Court below summarily entered the following order denying the said petition:

“Petitioner having filed his petition for Writ of Habeas Corpus in the above entitled Court and the moving papers have been considered,

IT IS ORDERED that the Writ of Habeas Corpus be, and the same is hereby DENIED.

DATED: May 11, 1951.

GEORGE B. HARRIS,
United States District Judge.

Waldon v. United States, 84 F. Supp. 449;

Redmon v. Squire, 162 F. (2d) 195;

Waldon v. Swope, 29233-E (Nov. 23, 1949).''

(Tr. 25.)

From this order appellant now appeals to this Honorable Court. (Tr. 26.)

ISSUES.

The issues involved herein, as likewise involved in the original appeal, may, in substance, be stated as follows:

Is the appellant entitled to relief by habeas corpus because

1. women were excluded from the trial jury panel, whose members convicted him in the Eastern District of Illinois in February of 1940?

and because

2. he was sentenced to fine and imprisonment under authority of a statute where only imprisonment was permitted and such fine was partially paid by distraint of his personal property before judgment was corrected in his absence to eliminate the fine?

ARGUMENT.

Inasmuch as the exact issues raised by the appellant in our case at bar were decided adversely to him in the decision of this Honorable Court in *Waldon v. Swope*, supra, appellee will rely solely upon this decision and the authorities stated therein as his sole argument in this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
August 24, 1951.

CHAUNCEY TRAMUTOLO,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.



